IN THE COURT OF APPEALS OF IOWA

No. 0-732 / 90-935

FILED
FEB 26 1991
CLERK SUPREME COURT

IN THE INTEREST OF B.B.,
A Child,

A.B. and **A.B.**, Parents,

Appellants.

17

Appeal from the Iowa District Court for Tama County, Jane F. Spande, District Associate Judge.

Parents appeal continuance of foster care placement. **AFFIRMED AS MODIFIED.**

Patrick L. Wilson, Marshalltown, for parents-appellants.

Bonnie J. Campbell, Attorney General, Gordon E. Allen, Deputy Attorney General, and Charles K. Phillips, Assistant Attorney General, for appellee State.

Stephen A. Kenkel, Toledo, guardian ad litem, for child (appellee).

Heard by Oxberger, C.J., and Schlegel and Sackett, JJ.

OXBERGER, C.J.

B.B. is a boy born in June 1977. He was adjudicated a child in need of assistance (CINA) in 1989, after the supreme court reversed an order declining to make a CINA adjudication. See In re B.B., 440 N.W.2d 594 (Iowa 1989). The primary reason for the CINA adjudication was B.B.'s parents' refusal to send him to school. The parents' refusal did not involve any objections to public education per se, but rather exaggerated concerns for the child's physical health and disagreement with the decision by school officials to place B.B. in special education classes.

In its 1989 opinion relating to this child, the supreme court found B.B. was a child in need of assistance pursuant to Iowa Code section 232.2(6)(c)(2). Iowa Code section 232.2(6)(c)(2), in pertinent part, defines a child in need of assistance as an unmarried child: "(c) Who has suffered or is imminently likely to suffer harmful effects as a result of: . . .(2) The failure of the child's parent . . . to exercise a reasonable degree of care in supervising the child."

The court stated:

> [B.B.], although of limited intelligence, is entitled to educational opportunities that will maximize his talents and abilities. In his case, the experts all agree that special education classes in school will provide those opportunities and that no more time can be wasted in this respect. * * * [B.B.] should attend school. We think that is the only way to ensure he will receive the benefit of special education classes.

> On the other hand, we think [B.B.] should continue to have the love and attention of family and should therefore remain in the custody of his parents. See Iowa Code § 232.101(1). If the parents demonstrate continued resistance to in-school teaching, the juvenile court should then consider placement outside the home. See Iowa Code § 232.102.

In re B.B., 440 N.W. 2d at 597-98 (emphasis in original).

In September 1989, the juvenile court took emergency custody of B.B. because his parents were incarcerated pursuant to a contempt order for their persistent failure to prepare and present the child for school unless obtaining a medical excuse documented by a physician or nurse. B.B.'s parents are no longer incarcerated. However, following a review hearing, the juvenile court ordered continued foster care placement of B.B. This May 21, 1990, order also provided for supervised visits for his parents with a goal of family reunification. The juvenile court did not feel the parents were exhibiting any cooperative behaviors other than promises to cooperate similar to those they had given before. The juvenile court stated the parents' current behaviors were not showing any marked changes from their prior history of noncooperation with service providers.

In March 1990 B.B. was hospitalized for persistent vomiting, weight loss and lack of appetite. Various physiological and psychological tests were conducted during his hospital stay. No physical problems were found to be causing the vomiting. One theory resulting from the

testing was that perhaps unintentional reinforcement of "sickness" accounted for the vomiting behavior. This theory of "environmental causation" came from a finding that B.B. is easily influenced by others as well as being very responsive to those influences. It was recommended a protocol for responding to B.B.'s vomiting might be helpful as well as exploring family functioning and involvement.

The parents have appealed the May 1990 order continuing foster placement. They contend the evidence did not support continued foster care placement. They also argue the State failed to prove the child would suffer harm if returned to their home and assert they have never physically abused or neglected B.B.

In its 1989 opinion the supreme court characterized the mother as a "loving parent," although "also a doting and overprotective one" whose "blind devotion to the child" has made her "irrational" on the subject of schooling. In re B.B., 440 N.W.2d at 597.

Both the State and B.B.'s guardian ad litem filed appellee's briefs supporting continued foster care placement. Both appellees argue B.B. has made great strides in academic and social skills while in foster care and while attending school regularly.

We review CINA proceedings de novo. In re D.L., 410 N.W.2d 201, 202 (Iowa App. 1986). We give weight to the fact-findings of the juvenile court, but are not bound by

them. Iowa R. App. P. 14(f)(7). We review the facts and the law and adjudicate rights anew while bearing in mind our paramount concern is the welfare and best interest of the child involved. In re D.L., 410 N.W.2d at 202. An interest exists in maintaining the family unit, but that interest may be forfeited by certain parental conduct. In re N.H., 383 N.W.2d 570, 574 (Iowa 1986)(citation omitted).

When seeking the return of a child removed from the home by a CINA proceeding, parents carry the burden of proving by a preponderance of the evidence the child will not suffer harm if returned. Iowa Code §232.102(7); In re Blackledge, 304 N.W.2d 209, 214 (Iowa 1981). In determining the best interest of a child, we look at present conditions and past performance, because the past performance "may be indicative of the quality of future care" the parents are capable of providing. In re Dameron, 306 N.W.2d 743, 745 (Iowa 1981).

We agree with the juvenile court that the parents have failed to show by a preponderance of the evidence B.B. can be returned to their home on a continuous basis. At this point, the parents' past history of refusing to cooperate in ensuring B.B.'s school attendance seems more probative of the future than promises similar to those not kept in the past. Even so, we feel more efforts should be made toward family reunification. Since the neglect of B.B. revolves around school attendance, we believe the foster

care placement should be more finely tailored to the goal of B.B.'s continued school attendance. We also believe that absent a showing B.B.'s parents will thwart his return to foster care during school weeks, B.B. should spend weekends and school holidays unsupervised with his family.

We affirm the juvenile court order continuing foster care of B.B. during the weeks he attends school. We order unsupervised in-home visits between B.B. and his parents during weekends and during periods of the year when school is not in session or is in holiday recess.

This arrangement is conditioned upon B.B.'s parents' cooperation and compliance with DHS efforts to ensure B.B. attends school. If B.B.'s parents refuse to cooperate with DHS, or threaten the safety of DHS workers providing services to B.B., then we believe complete out-of-home placement should again be instituted with limited supervised visitation. We expect DHS to monitor B.B. closely to ensure in-home visitation is not detrimental to B.B.'s academic or social well-being.

AFFIRMED AS MODIFIED.

Schlegel, J., concurs; Sackett, J., concurs in part and dissents in part.

SACKETT, J. (concurring in part and dissenting in part)

I totally concur with the majority's decision to allow this child to have unsupervised visits with his parents in their home. I find no valid reason to support the need for supervised visits.

I would go further than the majority. I would dismiss the child in need of assistance proceeding and allow this child to return to his parental home. It is basically undisputed that in his parental home his physical needs have always been very adequately met. In his parental home he has been loved and nurtured by his parents and his older siblings. In his parental home he has received training from his mother, a certified teacher. The parental home is where the child wants to be.

This child is mentally handicapped. He has an IQ of about forty. This case questions the rights of his parents to make decisions about his educational training. This case also focuses on what State intervention is necessary when parents do not allegedly cooperate with State dictates for compulsory education.

What this case should focus on is what is best for this young child. The child was taken away from his parents when they were both jailed for a six-month sentence for not sending him to school. Iowa has an excellent public school system, but these schools do not always provide the answers for all children. A child with below average intellectual

skills introduces different challenges to raising and educating.

Some families are unable to meet the challenges and seek some or extensive outside assistance to meet the challenges. Our school systems have established networks to assist. Other families devote extensive personal resources to the child. This family has made such a commitment. The child was removed from his parents' care on October 4, 1989. Central Iowa Residential Services did an assessment of B.B.'s strengths and needs from December 1989 to January 16, 1990. The strengths shown on the assessment are significant.

STRENGTHS

Skill Area: **SOCIAL/EMOTIONAL/BEHAVIORAL**

B.B. talks about family members and receives visits from family.

B.B. independently obtains and shows pictures of family members which he keeps in a billfold.

B.B. independently obtains and shows some personal possessions, others with prompt.

B.B. receives gifts from family members and celebrated Christmas with family.

B.B. responds positively to affection and will laugh when happy.

B.B. can be reasoned with and responds when talked to.

B.B. is well-behaved at all times (does not pout, cry, yell, etc.).

B.B. has had no problems with illness during foster placement.

B.B. will assist if asked and can be redirected without incident.

B.B. is nonagressive in interactions with others.

B.B.'s speech is more easily understood when he talks about the past.

B.B. talks/asks questions about cars (makes & models.

B.B. has achieved perfect school attendance at Grinnell Middle School and looks forward to going to school daily.

B.B. can remember people who are seen inconsistently/infrequently.

B.B. will imitate physical gestures of others.

B.B. is interested in other people and considerate of their feelings.

B.B. appears to have adjusted well to his foster parents.

Skill Area: **PARENTING SKILLS EDUCATION AND TRAINING**

B.B. eats breakfast daily.

B.B. will eat most foods (exceptions being: hot dogs and mayonnaise).

B.B. demonstrates knowledge of table manners.

B.B. has independent toileting skills.

B.B. brushes teeth independently.

B.B. knows bedtime is 9:00 P.M. and will remind care providers.

B.B. is able to tell time to the hour.

B.B. dresses and undresses independently.

B.B. rinses and stacks dishes when asked.

B.B. puts dishes on table and clears table when asked.

B.B. takes out garbage when asked.

B.B. demonstrates desire to please when given directions.

B.B. is able to follow two-part directions if part of a familiar routine (and part of receptive vocabulary).

B.B. demonstrates ability to attend school daily without incident.

B.B. has no physical complaints and has not vomited since initial phase of foster care placement.

B.B. presents no discipline problems

B.B.'s basic needs are met (shelter, food, care and supervision, etc.).

Skill Area: **LEISURE/RECREATION**

B.B. has good, basic coordination skills.

B.B. spends free time watching TV.

B.B. will put together puzzles (can assemble 500 piece zig saw puzzles).

B.B. will passively participate in group leisure/recreation activities.

B.B. will attend a leisure/recreation activity when prompted.

B.B. has opportunities to participate in leisure/recreation activities at school through his Individual Education Plan (I.E.P.) goals.

Skill Area: **COMMUNITY ASSISTANCE**

> B.B. is attending school daily.
> B.B. was taken Christmas shopping.
> B.B. helped purchase Christmas presents for family members.
> B.B. has opportunities to access community resources and handle money through school (I.E.P.) goals.

The child seemed to be able to accept tasks according to his ability, be easy to care for and well adjusted. These parents obviously have done an excellent job with this child. The mother has kept the child out of school because of what she contended was a vomiting problem. After three months in foster care:

> B.B. was taken to Dr. Paulson by the foster mother on 3-14-90 because he vomited three times that morning in school. His temperature was 99.6 degrees. Since 3-06-90, B.B. has vomited at school during lunch almost every day. According to this worker's conversation with Dr. Paulson, Grinnell, B.B. has lost three pounds in three days. Dr. Paulson wants B.B. hospitalized to determine the cause of the vomiting. Arrangements were made to admit B.B. to University Hospitals at Iowa City. Because Mrs. B. was adamant that B.B. be admitted to Iowa Methodist, Des Moines, and because B.B. has medical records there, Dr. Paulson referred B.B. to Blank Children's Hospital-Iowa Methodist.

What intellectual progress has the child made since being taken from his parents and placed in foster care? The most substantial progress I have been able to ascertain is he has learned to tie his shoes. Whether this is a skill he was able to learn as he matured or whether only the school could have taught this, I am unsure. Has this progress justified jailing his parents, taking him away

from his parents and siblings, and forcing him to live in a foster home? I advance that it does not.