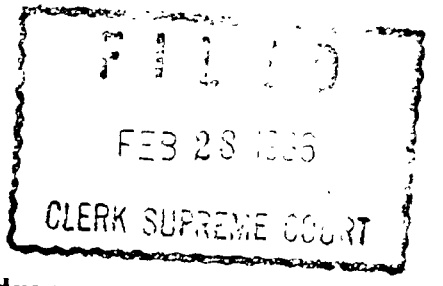
IN THE COURT OF APPEALS OF IOWA

No 6-042 / 95-1281



IN THE MATTER OF W.B., M.W., A.B., and D.B., Minor Children,

W.B., Father,

Appellant.

Appeal from the Iowa District Court for Scott County, John G. Mullen, District Associate Judge.

Father appeals the denial of his motions for expanded visitation and for a new trial on the issue of domestic violence. **AFFIRMED.**

Robert J. Phelps of Phelps & Phelps, Davenport, for appellant.

Thomas J. Miller, Attorney General, Diane Stahle, Special Assistant Attorney General, Judy Sheirbon, Assistant Attorney General, and Henry C. Filseth, Assistant County Attorney, for appellee State.

Vincent J. Motto of VanderVennet, Motto & Aitken, P.C., Davenport, for minor children.

Heard by Habhab, P.J., Huitink, J., and Schlegel, S.J.*

*Senior judge from the Iowa Court of Appeals serving by order of the Iowa Supreme Court.

HUTTINK, J.

William Sr. appeals the district court order denying his motions for expanded visitation and a new trial on the issue of domestic violence. We affirm.

William Sr. ("Bill") and Gabrielle are the parents of four children, Matthew, born April 23, 1988; William Jr ("Billy") born August 7, 1990; Angela, born September 14, 1992; and Daniel, born September 20, 1993. Matthew and Billy were both adjudicated CINA in separate proceedings during 1991 as a result of Gabrielle's problems with substance abuse and inability to adequately care for her children. In July 1993 Matthew and Billy were placed in foster care pursuant to a modified dispositional order. At that time, both boys were found to be suffering significant delays in academic performance, language skills, social skills, and behavior function as a result of their home environment. The dispositional order chronicled Bill and Gabrielle's history of noncompliance with support programs and use of intimidation to avoid services. The court also noted problems regarding Bill's domestic abuse and threatening behavior as well as the failure of both parents to accept responsibility for their actions. In addition to placing both boys in foster care, the court ordered both parents to participate in domestic violence counseling.

In July and December 1993 Angela and Daniel, respectively, were adjudicated CINA, and the court again ordered Bill and Gabrielle to participate in domestic abuse counseling. Bill, however, continued to exhibit threatening and intimidating behavior, leading to the suspension of his visitation with Matthew and Billy in September 1994.

The following month, Bill was found in contempt for failing to attend the Batterer's Education Program and was sentenced to thirty days in the county jail.

Following his release, Bill increased his level of participation in the Batterer's Education Program. In a December 1994 review order, the district court determined that visitation restrictions would continue until the impact of the domestic abuse program could be determined. The court noted that Gabrielle had fulfilled most of her responsibilities under her case plan and that she was maintaining her sobriety. On appeal, we affirmed this review order and the court's visitation restrictions. *See In re W.B.*, No. 5-409/94-2154 (Iowa App. 1995) (slip op. filed October 31, 1995).

The juvenile court resumed visitation between Bill and the older boys in February 1995 while Angela and Daniel remained in their parents' custody under the department's supervision. The juvenile court denied Bill's subsequent motion for overnight visitation or return of custody and removal of the caseworker. The court noted that while Bill was attending the batterer's program somewhat regularly, he continued to deny responsibility for domestic violence. Service providers also indicated that Bill was hostile and failed to participate in parenting training. As a result, the court continued the foster care placement and ordered compliance with the case plan.

Bill filed a motion for a new trial of the review hearing and attached a letter signed by Gabrielle denying that Bill had been physically abusive. Bill contended that

this "new evidence" warranted a return of the boys and the removal of the requirement that he attend the batterer's program. The juvenile court denied the motion following a hearing. Bill appeals.

Review of an order arising out of CINA proceedings is de novo. *In re Blackledge*, 304 N.W.2d 209, 210 (Iowa 1981). We give weight to the juvenile court's findings of fact, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7). In cases involving child custody, our first and governing concern is the best interest of the children. Iowa R. App. P. 14(f)(15).

Bill first contends that Gabrielle's letter constitutes new evidence necessitating a new trial. We disagree. For an individual to prevail on a motion for a new trial based on newly-discovered evidence he or she must show that the evidence (1) was discovered after trial; (2) could not have been discovered earlier in the exercise of due diligence; (3) is material to the issues in the case; and (4) would probably have changed the result of the trial. *Jones v. State*, 479 N.W.2d 265, 274 (Iowa 1991). We vest unusually broad discretion in the trial court's ruling on a motion for new trial on the basis of newly-discovered evidence. *Mays v. C. Mac Chambers Co.*, 490 N.W.2d 800, 801 (Iowa 1992).

Applying this standard, we find that Gabrielle's recantation is not newly-discovered evidence that would likely have changed the result of the trial. The record includes multiple findings of domestic abuse in Bill and Gabrielle's relationship dating

back to 1993 and have resulted in the continued requirement for Bill to attend domestic abuse counseling. As a result we, like the juvenile court, question the credibility of Gabrielle's recantation. We find that even if the juvenile court had been able to consider Gabrielle's letter, it is unlikely that the result would have been different.

We further reject Bill's contention that the juvenile court erred in requiring him to continue in the Batterer's Education Program. The record shows that although Bill has been attending the program somewhat regularly, he has not taken responsibility for his actions and continues to deny he has a problem with domestic violence. Moreover, our review of the record reveals that Bill continues to exhibit hostile and intimidating behavior toward his family and social service workers despite his contentions to the contrary. These behaviors provide sufficient reason for Bill to continue the Batterer's Education Program and domestic abuse counseling.

Finally, we conclude that the juvenile court did not err in ordering Matthew and Billy's continued placement in foster care. A parent seeking return of a child after the child has been placed in foster care must show by a preponderance of the evidence that the child, if returned, would not suffer adjudicatory harm. *In re A.Y.H.*, 483 N.W.2d 820, 822 (Iowa 1992). Our review of the record reveals that the return of Matthew and Billy to Bill's care would likely result in harm to the children. Billy suffers from an oppositional defiant disorder that causes him to throw temper tantrums and exhibit other hostile behavior. His play therapist testified that in light of these and other

problems, reunification should not occur until Bill has successfully completed the batterer's program. We agree with the district court that the potential for successful reunification of the family depends on Bill's ability to take responsibility for his actions and the elimination of his abusive behavior. Until this happens, the children's interests are best served by placement in foster care.

We have carefully considered all of the issues Bill has raised on appeal and find them to be either covered by this opinion or without merit. We affirm the decision of the district court in its entirety.

AFFIRMED.