IN THE COURT OF APPEALS OF IOWA

JUN 26 1997

No. 7-184 / 96-1841

000187

IN THE INTEREST OF T.H., Minor Child,

S.Y., Mother,

Appellant,

Appeal from the Iowa District Court for Jasper County, Thomas W. Mott, District Associate Judge.

The mother appeals from a dispositional review order placing custody of her minor son with the father in a child-in-need-of-assistance proceeding. **AFFIRMED.**

Brad McCall and Lois J. Vroom of Brierly Law Office, Newton, for appellant.

Thomas J. Miller, Attorney General, Mary K. Wickman, Assistant Attorney General, and R. Steven Johnson, County Attorney, for appellee State.

George Arvidson, Des Moines, for minor child.

Considered by Sackett, P.J., and Huitink and Streit, JJ.

HUITINK, J.

Sandra and Justin are the parents of Travis, who was born on March 9, 1984. Sandra and Justin were never married, and separated about two years after Travis's birth.

Sandra and Travis came to the attention of the Department of Human Services (DHS) because Sandra was refusing to send Travis to school. Travis has an above-average IQ, but because of behavioral problems was placed in a special education class. Travis has been engaged in many physical altercations in school with peers and teachers. Travis has been diagnosed as having attention deficit disorder (ADD) and anger management problems. Sandra believed the school system was the cause of Travis's problems.

On February 27, 1996, the juvenile court determined Travis was a child in need of assistance. The court made the following conclusions: (1) Sandra neglected Travis by failing to send him to school; (2) Sandra failed to exercise a reasonable degree of care in supervising him by not sending him to school; (3) Travis needed treatment for a mental disorder or emotional damage evidenced by untoward aggressive behavior toward self or others which the parent would not provide; and (4) Sandra's mental condition resulted in Travis not receiving adequate care.

Travis was placed in Sandra's custody, under the protective supervision of DHS. The court ordered a comprehensive evaluation for Sandra and Travis, and

ordered that each follow the recommendations of the evaluation. Travis was ordered to attend school full-time. The court ruled that if Travis failed to attend school full-time, he would be placed in the custody of his father or in shelter care.

In May 1996, Sandra was hospitalized due to risk of self-harm. Travis went to live with his maternal grandmother. Travis was suspended from school for a period of time due to his refusal to obey teachers. He was also adjudicated to be delinquent for committing acts of assault. A psychologist determined Travis probably needed therapy and medication to help him deal with his ADD. After Sandra was released, she was ordered by the juvenile court to provide a report from her physician concerning her mental health.

The State filed a petition to modify the dispositional order because Travis's behavior continued to deteriorate. Sandra failed to appear for the dispositional hearing. The juvenile court denied her attorney's request for a continuance. At the hearing, Justin testified he would like to have custody of Travis. He stated he was willing to send Travis to school and would work with service providers.

On September 19, 1996, the juvenile court determined Travis's placement should be modified. The court found Sandra had failed to cooperate with services. The court concluded Travis should be placed in the custody of Justin. Sandra appealed the order placing Travis in the custody of his father.

I. Our scope of review of CINA proceedings is de novo. *In re A.S.T.*, 508 N.W.2d 735, 737 (Iowa App. 1993). Although we give weight to the factual determinations of the juvenile court, especially when considering the credibility of witnesses, we are not bound by them. *In re T.A.L.*, 505 N.W.2d 480, 482 (Iowa 1993). Our paramount concern is the best interests of the child. *In re N.M.W.*, 461 N.W.2d 478, 480 (Iowa App. 1990).

II. Sandra claims it was not in Travis's best interests to remove him from her care. She believes the juvenile court removed Travis from her care because she refused to send him to conventional public school. Sandra wanted to teach Travis at home and had taken the steps necessary to apply for approval of a home-schooling program.

We do not believe the court's decision was based on the issue of whether Travis attended public school. The problem was Travis was not attending any school at the time of the dispositional hearing. Sandra had not yet gained approval for a home-schooling program and she was not sending Travis to public school.

Furthermore, Travis's failure to attend school was not the only problem the family faced. Sandra had not sought advice or treatment for Travis's ADD. She was not amenable to services. Additionally, Sandra did not turn over her mental health information. Because of these problems, Travis's behavior continued to deteriorate.

Sandra also argues it was not in Travis's best interests to place him in Justin's care. She claims the State failed to adequately investigate the propriety of placement with Justin. She points out that Justin was an alcoholic and had a criminal record. Justin was currently on probation for possession of a firearm by a felon.

Justin testified he lived in a two-bedroom trailer house with his girlfriend, and Travis would have his own room. Justin was self-employed as a painter. He stated he had received counseling for alcoholism, and no longer drank. Justin testified he was willing to assume the responsibility of raising Travis. He recognized the importance of an education and stated he would cooperate with service providers. Justin asserted he intended to have Travis evaluated for ADD and receive treatment if necessary. We find it is in Travis's best interests to be placed in the custody of Justin.

III. Sandra claims the requirements of Iowa Code section 232.102(5)(b) are applicable to this case. This section requires that in order for the State to transfer legal custody of a child, the State must show that reasonable efforts were made to prevent the removal of the child from the home, and that the child would be subjected to some harm if left in the home. Sandra contends the State has not made the necessary showing to remove Travis from her care.

We find section 232.101(1) is the applicable section because custody of Travis was not transferred to someone other than his parents. Sandra and Justin were both

entitled to legal custody of Travis before the initiation of the CINA proceedings. Under section 232.101, the court has authority to place a child with a parent who has a right to legal custody. The fact Justin did not have physical custody of Travis prior to these proceedings did not affect his status as an parent or his legal right to custody in the absence of an adjudication. *See In re J.R.H.,* 358 N.W.2d 311, 319 (Iowa 1984). We determine that pursuant to section 232.101, the juvenile court could place Travis in the custody of Justin.

IV. Sandra contends the juvenile court should have granted her motion for continuance. Sandra admits she was absent from the hearing without explanation. She states, however, that another witness who she planned to call was absent due to a prior commitment.

We must consider whether the juvenile court abused its discretion in denying the motion for continuance. *In re R.B.,* 493 N.W.2d 897, 898 (Iowa App. 1992). We find no abuse of discretion in the present case. Time is of the essence when dealing with children's issues. *In re C.D.,* 508 N.W.2d 97, 99 (Iowa App. 1993). Due to the fact Travis had already missed the first two weeks of school, we agree with the juvenile court that a continuance was not in his best interests.

We affirm the decision of the juvenile court placing Travis in the care of his father, Justin. Costs of this appeal are assessed to Sandra.

AFFIRMED.