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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

IN THE INTEREST OF	)	Filed September 9, 1977
MARY ANN LYONS,	)	
A Child - Appellant.	)	210 3-60135

Appeal from Dubuque District Court, Thomas H. Nelson, Judge.

Appeal from determination of child in need of assistance.

REVERSED AND REMANDED.

John J. Cody, Jr., of Dubuque, counsel for appellant.

John Locher, of Farley, counsel for April Dean.

Paul Fitzsimmons, of Dubuque, counsel for David Lyons.

James W. Herrig, of Dubuque, counsel for Dubuque County Department of Social Services.

Submitted to Allbee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

DONIELSON, J.

Mary Ann Lyons, the child-appellant, appeals the determination of the juvenile court that she is a child in need of assistance, § 232.33, The Code, and should be remanded to the Department of Social Services for placement. She argues that the court erred by basing its order upon facts outside the record, and that the evidence present in the record was insufficient to support the court's finding.

On August 4, 1976, a petition which alleged that Mary was in need of assistance was filed. A hearing which was attended by both the juvenile's parents, representatives of the Iowa Department of Social Services, and counsel for all parties, was held on November 8. On November 10, the juvenile court filed Findings of Fact, Conclusions of Law, and Judgment and Decree.

This appeal entails detailed factual situations which must be partially developed for a complete understanding of this case. The parents of the child, April and David Lyons, were married in 1958, and their marriage was dissolved in 1964. After the dissolution, April was given custody of the children. However, she returned them to the father in 1967 where they remained until 1968. April then took them back and kept them until December of that year, when she returned them to David. Subsequently, David Lyons petitioned the court for custody of the children, and the petition was granted the next year.

During the period that Mary was living with her father, she had run away on several occasions and had told her case worker that she feared her father and wanted to live with her mother. When Mary would run away from her father, she would apparently visit her mother. On one occasion, Mary lived with April for approximately two weeks, and April refused to inform the father of the child's whereabouts or release Mary to the custody of the Department of Social Services. During this period in June of 1976 when Mary ran away from her father to be with her mother, she expressed a desire to live with her mother, and April expressed the same wish.

On August 25, 1976, the juvenile court issued an order that custody of Mary be transferred to the Department of Social Services pending further hearing. Soon after Mary was temporarily placed in a foster home, problems developed. She had broken house rules by smoking and visiting her mother without permission of the

foster parents and at times not specifically authorized in the order of the court.[1] Consequently, the foster parents felt they were unable to trust Mary, and she had voluntarily gone to the home of her aunt and uncle, where she resided until the hearing in this case.

Although some testimony indicates that April had previously been unwilling to cooperate with counseling and examinations requested by the Department of Social Services, she did testify at the hearing that she would do whatever was necessary in order to regain custody of Mary.

After speaking with both parents, the foster parents and Mary, the case worker recommended to the court that Mary be placed with her mother so that she could try to get to know her better, [2] and that, in view of April's inconsistent history, the Department maintain custody of Mary for six months with a trial placement with her mother, and continuing supervision and in-home treatment by the Department. He also recommended visitation rights for the father. The case worker also testified that he believed a foster home arrangement "would be unworkable and probably harmful to Mary" at this time.

In its Judgment and Decree of November 10, the court committed Mary to the Department of Social Services for placement. In reaching this decision, the court relied upon and quoted extensively from a Probation Office report dated March 6, 1969, which was neither admitted nor introduced into evidence at the hearing. The judgment and decree of the court further indicates that this report was not made a part of the record because of objection by counsel. The relevant portions of this report dealt with the marital and parental instability of April and David, the possibly bigamous marriage of April to both Donald Ingles, a prisoner at Fort Madison, and Leonard Dean, and April's mental instability. The only testimony at the hearing regarding April's marital situation was that her marital problems were a thing of the past.

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[1] A conflict in the testimony arose regarding whether the time specified in the August 25 order for visitation by April was the exclusive amount of time permissible, or the minimum amount allowed.

[2] At the hearing, the father objected to placement with the mother because he believes that she had "misled" Mary on several occasions and was generally an unfit parent.

Mary now appeals the judgment of the juvenile court, arguing that the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution and § 232.31, The Code, mandate that the court's decision be reversed. Although juvenile proceedings are neither criminal nor civil in nature, the minimum requirements of due process, including the rights of confrontation and cross-examination, must be satisfied. In re Delaney, 185 N.W.2d 726, 728-731 (Iowa 1971), In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 554 (1967). As the Delaney court stated:

> " 'Constitutional safeguards must be observed in this class of proceeding. . . . fulfillment of constitutional requirements cannot be avoided. The parties have the right to be faced by and hear the witnesses who give evidence in court against him and have the opportunity to cross-examine them. . . . Due process means the presentation of competent evidence on which the findings of the court are predicated and the commitment rests." Delaney, supra, at 731; see also Alsager v. District Court of Polk County, 406 F.Supp. 10 (S.D. Iowa, 1975).

Consistent with the Fifth and Sixth Amendments to the U. S. Constitution, a finding of delinquency leading to a deprivation of liberty must be based upon sworn testimony, subject to the full opportunity for cross-examination. In re Gault, supra, at 57. The Iowa cases are in accord. See, e.g., Orcutt v. State, 173 N.W.2d 66, 72-73 (Iowa 1969), In Interest of Meek, 236 N.W.2d 284, 289-290 (Iowa 1975), In Interest of Wheeler, 229 N.W.2d 241, 243 (Iowa 1975).

There is some doubt whether the safeguards of Gault were intended to apply in the dependency as well as the delinquency context. Although language in In re Delaney, supra, would support such application, the court in In Interest of Meek, 236 N.W.2d 284, 290 (Iowa 1975), stated that "the protections provided in Gault . . . were intended to be limited to the adjudicatory stage of delinquency proceedings." (emphasis added).

Even if such constitutional safeguards are not applicable in this situation, the actions of the trial court appear to violate § 232.31, The Code. That section requires that the "court's finding with respect to a child in need of assistance shall be based upon clear and convincing evidence under the rules applicable to the trial of civil cases, provided that relevant and material information of any nature including that contained in reports . . . may be admitted and relied upon to the extent of its probative value." However, the statute also requires that when such a

report is admitted in evidence, the person making the report shall be subject to direct and cross-examination when reasonably available.

In the instant case, the juvenile court extensively relied upon the statements contained in a Probation Office report from 1969. The report was not admitted into evidence, nor is there any indication that the author of the report was called as a witness. The juvenile court's reliance upon this report constitutes a violation of § 232.31 in that not only were the rules of evidence applicable to civil cases not followed, but no rules of evidence were followed. Additionally, there was no opportunity for examination of the author of this report. [3] Section 232.31 requires that the court's finding be based upon "clear and convincing evidence." Since the court utilized information not even admitted into evidence, the court's finding inherently could not have been based upon clear and convincing evidence.

Although our review in this case is de novo, In re Delaney, supra, at 728, we do not feel that the present state of the record enables us to form an equitable remedy in the best interests of Mary. [4]

We feel that the statements contained in the 1969 Probation Office report are of such a serious nature as to require a further hearing by the juvenile court in order to safeguard the best interests of Mary. However, if, consistent with the requirements of § 232.31, such matters may not be explored at the hearing, the juvenile court must render its decision based solely on the relevant admissible evidence. Therefore, we reverse the judgment of the district court and remand.

REVERSED AND REMANDED.

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[3] Although § 232.31 only requires direct and cross-examination of the person making the report when reasonably available, there is no evidence in the record to indicate the author of the report or whether he or she was available for the hearing. The statute would appear to require such a determination.

[4] The appellant urges us to consider only the relevant admissible evidence from the hearing and award custody to the mother. Although we have the authority to do so, we decline the invitation because of the state of the record and our desire to have the statements made in the Probation Report fully explored, if possible, in a hearing based upon admissible evidence. See, In Interest of Wheeler, supra, at 244.