IN THE COURT OF APPEALS OF IOWA

No. 6-667 / 96-0489

FILED
NOV 27 1996
CLERK SUPREME COURT

IN THE INTEREST OF D.P. AND T.M., Minor Children,

B.P., Mother,

Appellant.

Appeal from the Iowa District Court for Woodbury County, Brian L. Michaelson, Judge.

The mother appeals from the court's order modifying the disposition order and granting custody of T.M. to his father. **AFFIRMED.**

Michael K. Williams, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Diane Stahle, Special Assistant Attorney General, Maureen McGuire, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Rhoda M. Tenuta, Assistant County Attorney, for appellee State.

John C. Nelson, Sioux City, for appellee father, T.M.

Joseph Kertels, Sioux City, for minor children.

Heard by Streit, P.J., and Vogel, J., and Schlegel, S.J.*

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

STREIT, P.J.

The mother appeals from the court's order modifying the disposition order and granting custody of her son, T.M. to his father. The mother contends the court erred in granting the father of T.M. custodial rights because he did not acknowledge paternity until after the commencement of the juvenile court proceedings.

Brenda P. is the mother of two sons, Derek P., born July 8, 1990 and Tegan M., born January 3, 1994. The boys have different fathers. The father of D.P. is Dana S. and the father of Tegan is Tom M. This appeal concerns only the custody of Tegan.

In July 1991, Tom M. moved in with Brenda and her son Derek. Tegan was born in 1994. Ten months after Tegan's birth, Tom permanently moved from the residence. Tom paid child support for Tegan from October 1994 through February 1995. Tom visited Tegan approximately thirty times from October 1994 to July 1995. In May or June 1995, Tom moved to Wisconsin where he had secured employment.

On July 19, 1995, Tegan and Derek were removed from Brenda's custody because she was arrested for child endangerment and aggravated assault. On July 20, 1995, the State filed child in need of assistance (CINA) petitions. The court returned both children to Brenda's custody on July 28, 1995. On September 11, 1995, Tegan and Derek were removed from Brenda's custody again. On October 12, 1995, the court adjudicated both children in need of assistance, and ordered their continued placement in foster care. Brenda was ordered to complete treatment. The

Department of Human Services (DHS) was ordered to do a home study of Tom's residence. On November 28, 1996, Dana was granted custody of Derek. The court ordered Tegan's continued placement in foster care.

On January 21, 1996, Tom filed a motion to modify seeking custody of Tegan. Brenda then filed a similar motion to modify on January 26, 1996. On February 29, 1996, the court granted Tom custody of Tegan, and Brenda was allowed visitation.

Brenda appeals. She contends the juvenile court lacks jurisdiction to grant Tom custodial rights. Brenda argues she has sole custody of Tegan pursuant to Iowa Code section 600B.40 and, therefore, only a district court has jurisdiction to grant Tom custodial rights.

Appellate review of child in need of assistance proceedings is de novo. *In re L.K.S.*, 451 N.W.2d 819 (Iowa 1990). We give weight to the findings of fact made by the juvenile court, but we are not bound by them. *In re W.G.*, 349 N.W.2d 487, 491-92 (Iowa 1989), *cert. denied sub nom., J.G. Tauke*, 469 U.S. 1222 (1985).

Brenda contends the juvenile court did not have jurisdiction to grant custodial rights of Tegan to Tom M. under Iowa Code section 232.101 because Tom never had custody of Tegan. Under Iowa Code section 232.101, "after a dispositional hearing, the court may enter an order permitting the child's parent . . . to *retain* custody of the child subject to the terms and conditions which the court prescribes to assure the proper care and protection of the child." *See* Iowa Code § 232.101(1) (1995) (emphasis added). Since the verb "retain" means to "continue to hold . . . and to

keep," the court must find the parent had a right to custody of the child before granting custody under section 232.101. *See In Interest of B.L.*, 470 N.W.2d at 345.

Since Tegan was born out of wedlock, unless paternity has been acknowledged, the mother has sole custody of the child unless the court orders otherwise. *See* Iowa Code § 600B.40 (1995). The district court found Tom acknowledged paternity prior to the filing of the CINA proceedings. Tom lived with Tegan for periods of time from January to October 1994, paid child support, and visited Tegan after he moved out of Brenda's residence. Tom did have legal custody rights of Tegan prior to commencement of the proceedings. *See In Interest of L.B.*, 530 N.W.2d 465, 467 (Iowa App. 1995). We find the juvenile court had the authority to grant custody to Tom under Iowa Code section 232.101.

> When the issue of custody arises from the competing claims of unwed parents, we do not believe the critical issue to be which parent possesses the greater right to the child. Rather, we conclude that in a custody contest of this nature, the controlling consideration must be the interests of the child. *See* § 675.31, The Code 1979 [currently Iowa Code § 600B.31 (1995)] (The court has continuing jurisdiction "to determine ... custody in accordance with the interests of the child.") (emphasis added). This profound decision involves selecting as the custodial parent the person who can minister more effectively to the long-range best interests of the child. The objective ought always to be to place the child in the environment most likely to bring that child to healthy physical, mental and social maturity.

Heyer v. Peterson, 307 N.W.2d 1, 7 (Iowa 1981).

We conclude it would be in the best interest of Tegan to be placed with his father, Tom. Brenda's stability and future are uncertain. Her past neglect of Tegan

and failure to recognize and acknowledge that neglect concerns the court regarding her ability to provide for Tegan's best interests. She has admitted that Tom is a good father to Tegan. The juvenile court determined Tom was an appropriate care provider for Tegan. Accordingly, we affirm the order of the juvenile court granting custody to Tom.

AFFIRMED.