FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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

P.L., Natural Father,

Appellant.

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8-696
88-390

Appeal from the Iowa District Court for Wapello County (Juvenile J15-281), Gene W. Glenn, Juvenile Referee, and Richard J. Vogel, Judge.

In this child in need of assistance proceeding the natural father asked the child be placed in his custody. **REMANDED.**

Steven Gardner, of Kiple, Kiple, Denefe & Beaver, Ottumwa, for the appellant father.

Thomas M. Walter, of Johnson, Bauerle, Hester & Walter, Ottumwa, for the appellee mother.

Kirk A. Dailey, Ottumwa, guardian ad litem, for the child.

Thomas J. Miller, Attorney General; Katherine S. Miller-Todd, Assistant Attorney General; and R. Timothy Starken, Assistant County Attorney, for the appellee State.

Heard by Schlegel, P.J., and Hayden and Sackett, JJ.

SACKETT, J. 8

The question we must address is whether the trial court was correct in its determination the custody of a female child born August 14, 1985, to unmarried parents, should not be placed with her father.

On October 15, 1985, while the child was in the mother's custody, a petition was filed to have the child found to be a child in need of assistance. There were allegations of abuse and neglect based on actions of the mother. On October 28, 1985, the child was found to be a child in need of assistance but was allowed to remain with her natural mother. In February 1987 the father asked for legal custody or in the alternative the child be put with an appropriate custodian. On March 31, 1987, the court placed the child in foster care and denied the father's application for custody.

On June 28, 1987, the matter again came on for review. The trial court determined the mother had had no visits with the child since October and had indicated her desire to wash her hands of the matter. The natural father, however, was again seeking custody. He was directed to participate in substance abuse treatment and he and his wife were ordered to attend parenting classes and participate in family therapy.

On November 19, 1987, the Department of Human Services reported to the court the father and stepmother had had

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extended visitations with the child, the father had secured employment, he and his wife were purchasing a two-bedroom home that was neat and clean. The father and his wife had attended parenting classes, he had cooperated with drug and alcohol abuse personnel, and he and his wife had participated in family therapy. It was recommended by the department the child be placed with her father.

The matter came on for hearing before the juvenile referee. All evidence supports placing the child with the natural father except the evidence of the foster mother. The child's foster mother testified to a series of things the four-year-old child told her about her time with her father. She said the child told her her father and stepmother had several fights, her stepmother flushed some of her dad's pills down the bathroom stool, her father drank beer in front of her, she didn't always brush her teeth at her father's and she washed her own hair there. Additionally, the foster mother felt the child did not come back from visits as clean as she should have. The foster mother related an instance where the child came back in dirty socks.

The referee determined the father had not met his burden of showing by the preponderance of the evidence the child should be returned home. This order was affirmed by the trial court and appeal was taken.

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We reverse and remand to the district court to enter an order directing the child be placed in her father's custody and to make appropriate orders for supervision and additional family services.

Our review is de novo. In re Blackledge, 304 N.W.2d 209, 210 (Iowa 1981). The child was born to unwed parents. The father acknowledges paternity. The mother of a child born out of wedlock has the right to sole custody of the child unless paternity has been acknowledged by the father or the court has ordered otherwise. Iowa Code § 675.40 (1987). A mother, who had physical custody of the child cannot deprive an unwed father of his right to legal custody without proper notice. In re J.R.H., 358 N.W.2d 311, 319 (Iowa 1984). Both unwed parents share the right to legal custody of their children. Id.

The child was adjudicated a child in need of assistance based on proven allegations of abuse and neglect by the mother. The child was living with the mother when the court determined she should be placed in foster care.

There is some parallel between the father's position here and the mother's position in J.R.H., 358 N.W.2d at 320, where the Iowa court said:

> . . . In this instance, sufficient allegations were made and proved to support a finding that the father was not a fit custodian for these children. However, no such allegations were made or proved with regard to the mother. . . . Her right to legal custody has never been terminated. There has never been a hearing or determination by clear and convincing evidence that her children have suffered or are imminently likely to suffer some harm

resulting from her acts or omissions which would justify the adjudication of the children as in need of assistance.

Iowa Code section 232.101 provides in part:

> 1. After the dispositional hearing, the court may enter an order permitting the child's parent . . . at the time of the filing of the petition to retain custody of the child subject to terms and conditions which the court prescribes to assure the proper care and protection of the child. Such terms and conditions may include supervision of the child and the parent . . . by the department of human services, juvenile probation officer or other appropriate agency which the court designates. . . .

We do not interpret section 232.101 to exclude a parent who has a right of legal custody, but did not share physical custody prior to the commencement of the proceedings. See J.R.H., 358 N.W.2d at 320. Until there had been an adjudication by clear and convincing evidence the child had suffered or was likely to suffer harm resulting from acts or omissions of the father which would justify the adjudication of the children as children in need of assistance, the court should not have transferred legal custody of the child to the department. It should have utilized section 232.101. J.R.H., 358 N.W.2d at 321.

All evidence before the court except the evidence of the foster mother shows the natural father is an appropriate custodian. The department recommends him as a custodian. He has shown an interest in the child and in obtaining her custody from the start of these proceedings.

He has followed religiously the recommendations of the court and the department. He and his current wife have conscientiously attended classes and participated in family therapy.

We have seriously considered the evidence of the foster mother. We recognize foster parents spend considerable time with children. Because of their constant contact with the children they have an opportunity to make observations about the children that may not be made even by professionals who supervise placements. The foster mother's concerns about brushing teeth and dirty socks are given little or no attention. We consider evidence the father and mother have had arguments, realistically recognizing arguments between spouses are fairly common. Children will never live in an environment free of all strife. A child's exposure to some adversity is part of his or her conditioning for the adult life.

We have concern about the child's allegations the father was drinking beer. The foster mother's testimony does not reflect when the child saw the father drinking beer. There is some evidence the father may have used alcohol to excess at some time in the past. The father has cooperated with substance abuse. There was no evidence of an excessive use of alcohol at the hearing. There was no evidence the father currently had any problems with substance abuse. However, placement with the father should

require his continued contact with a substance abuse agency.

The father contends on appeal the juvenile referee denied his right to a fair and impartial hearing. We find it unnecessary to address this issue. It is important to our judicial system litigants perceive they are treated fairly. In order to avoid the appearance of unfairness, we remand this case to be heard before a different judicial officer.

We remand for further orders consistent with this opinion.

REMANDED.