IN THE COURT OF APPEALS OF IOWA

No. 3-296 / 92-602

FILED
SEP 02 1993
CLERK SUPREME COURT
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IN THE INTEREST OF K.R.K.W., A Child,

K.K., Mother,

Appellant.

Appeal from the Iowa District Court for Johnson County, Juvenile Division, John R. Sladek, District Associate Judge and Patrick R. Grady, Associate Juvenile Judge.

The mother appeals a juvenile court order dismissing the child in need of assistance proceedings and orders concerning the guardian ad litem for K.R.K.W. **AFFIRMED IN PART, VACATED IN PART, AND REMANDED.**

Kathleen A. Kruse, Iowa City, pro se.

Bonnie J. Campbell, Attorney General, John M. Parmeter, Special Assistant Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, and Deborah Farmer-Minot, Assistant County Attorney, for appellee State.

Patricia A. Kamath, Iowa City, for the father.

Considered by Donielson P.J., and Hayden and Habhab, JJ.

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DONIELSON, P.J.

In No. 91-1403, K.K. appealed a juvenile court order granting a motion for concurrent jurisdiction for purposes of determining custody, visitation, and child support. On March 10, 1992, the supreme court issued an order directing the juvenile court to issue a ruling upon the application of the guardian ad litem for leave not to participate in the appeal and K.K.'s request that he be removed. K.K. filed a list of allegations why the guardian ad litem should be removed from the case.

On March 24, 1992 the juvenile court filed an order finding no evidence to support K.K.'s allegations. The juvenile court concluded that it would not be in the best interest of the child to have the guardian ad litem removed from the case because of his knowledge and understanding of the case and prior participation. Therefore, the juvenile court denied K.K.'s request for removal. The juvenile court granted the guardian ad litem's request for leave not to participate in appeal No. 91-1403. The juvenile court found that no issue had been raised placing the best interest of the child in jeopardy. K.K. appeals.

Subsequently, the supreme court dismissed file number 91-1403. The mother filed an application asking the supreme court to review its action. The supreme court denied the application and confirmed its prior order.

On August 6, 1992, the State filed a motion for remand to allow the juvenile court to address dismissing the

underlying juvenile case. On August 12, 1992, K.K. filed a resistance to the motion for remand, a cross-motion for remand with instructions, a cross-motion for consolidation of appellate proceedings, and a motion for postponement of decision and/or reconsideration. On September 14, 1992, the supreme court granted the State's motion and remanded the matter to the juvenile court. On October 30, 1992, the juvenile court dismissed the juvenile court proceedings.

In March 1989, K.R.K.W. was adjudicated a child in need of assistance (CINA) based upon stipulations of the parents pursuant to Iowa Code section 232.2(6)(f). At the hearing in October 1992 the juvenile court found the child was no longer showing the problems that resulted in her initial CINA adjudication and that the father was providing a loving, stable, secure home for the child. The juvenile court refused to rule on K.K.'s motions introduced that day, finding them moot in light of the dismissal. On November 24, 1992, K.K. filed notice of appeal. Pursuant to the supreme court's order on December 15, 1992, the court consolidated the two appeals.

K.K. first contends that District Associate Judge Sladek erred in failing to disqualify himself from the case due to a conflict. Judge Sladek ruled on the matters concerning the guardian ad litem. K.K. alleges that Judge Sladek and the guardian ad litem had a personal relationship in that both men belonged to the same legal fraternity while in law school. In addition, K.K. alleges

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that the guardian ad litem had a conflict of interest which should have disqualified him from serving in this case. K.K. also asserts that the guardian ad litem breached his fiduciary duty to the child by failing to introduce medical evidence to substantiate the claims of sexual abuse.

Finally, K.K. alleges that the juvenile court in October 1992 abused its discretion by prejudging the case and by displaying prejudice against her in not ruling on her motions before dismissing the case. K.K. asks this court to vacate the proceeding and remand it for legal action to protect the child.

I. Disqualification of the district court judge.

Appellant's first contention is that the district court judge should have recused himself from hearing the case. Recusal of judges is governed by the Code of Judicial Conduct, Canon 3 D(1), which states in pertinent part:

> A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
> a. The judge has a personal bias or prejudice concerning a party, . . .

The Iowa Supreme Court interpreted this canon in State v. Smith, 242 N.W.2d 320, 323-24 (Iowa 1976), and in State v. Smith, 282 N.W.2d 138, 142 (Iowa 1979). The court discussed the obligation of a trial court judge to recuse himself or herself because of personal bias in other cases including State v. Gartin, 271 N.W.2d 902, 913 (Iowa 1978);

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State v. Harry, 311 N.W.2d 108, 109 (Iowa 1981); State v. Farni, 323 N.W.2d 107, 110 (Iowa 1982); and Fosmark v. State, 349 N.W.2d 763, 767-68 (Iowa 1984). The following principles emerge. The trial judge determines whether or not personal bias or prejudice might affect impartiality. The determination of the trial court will not be overturned unless an abuse of discretion is shown. The party seeking to prove a judge is not impartial has a substantial burden. To constitute prejudice necessitating a different judge, "[t]he alleged bias and prejudice . . . must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." State v. Smith, 282 N.W.2d at 142 (citation omitted).

Appellant argues the mere fact that the judge and the guardian ad litem were members of the same national legal fraternity, Phi Delta Phi, while in law school more than a quarter century prior to the proceeding in question is sufficient to show personal bias. We disagree. A careful examination of the record discloses no evidence that the judge decided the case on anything other than its merits. No evidence was introduced that either the judge or the guardian ad litem have maintained their membership in the legal fraternity. Even if they have, no evidence was introduced to suggest any ongoing or current relationship between them which might be the basis for a claim of bias or prejudice. We find the fact of such membership in law

school, admitted by the judge and the guardian ad litem, does not rise to the level of reasonably questioning the judge's impartiality required by Canon 3 D(1) of the Code of Judicial Conduct. Therefore, the trial court did not abuse its discretion in refusing to recuse itself in this proceeding.

II. The guardian ad litem's representation of K.R.K.W.

Our review of juvenile court proceedings is de novo. In the Interest of W.B., 328 N.W.2d 518, 518 (Iowa 1983); In the Interest of K.J.F., 425 N.W.2d 669, 670 (Iowa App. 1988). We review both facts and law and adjudicate rights anew concerning propositions properly preserved for review. Id. (citing In re O'Neal, 303 N.W.2d 414, 422 (Iowa 1981)). K.K. argues that the guardian ad litem should be removed from this case because he ineffectively represented K.R.K.W. Since the juvenile court proceedings are civil, not criminal, no Sixth Amendment constitutional protections are implicated. In the Interest of J.P.B., 419 N.W.2d 387, 390 (Iowa 1988).

A. Conflict of interest.

Appellant first asserts that the guardian ad litem was ineffective because of conflicts of interest. When the allegation is conflict of interest, prejudice is presumed. Strickland v. Washington, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674, 689 (1984) (citations

omitted). Iowa follows a less restrictive standard than actual conflict of interest. "[I]t is enough if there is a 'substantial possibility' that a conflict of interest affected the lawyer's representation." Nichol v. State, 309 N.W.2d 468, 470 (Iowa 1981); Jackson v. Auger, 239 N.W.2d 180, 183 (Iowa 1976); Bumgardner v. State, 401 N.W.2d 211, 213 (Iowa App. 1986).

Appellant asserts that the guardian ad litem could not effectively represent K.R.K.W. because (1) his firm represents appellant's employer, (2) another partner in the firm filed a motion for a witness in this case, and (3) the guardian ad litem spoke with appellant on the phone before the case began. Canon 5 of the Iowa Code of Professional Conduct governs lawyers' actions concerning conflicts of interest. The ethical considerations and disciplinary rules of this canon control a lawyer's representation of multiple clients whose interests may conflict and a lawyer's representation of a client when the lawyer's interests would impair the lawyer's professional judgment.

Concerning the representation of appellant's employer, the record contains no evidence that the interests of the employer are related in any way to those of K.R.K.W. The record also contains no evidence of any actual or potential conflict between the interests of the employer and the child. We agree with the trial court that no conflict exists. We do not find even a remote possibility that

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representing appellant's employer could adversely affect the guardian ad litem's representation of K.R.K.W.

Concerning the motion filed for a witness in this case by another attorney in the guardian ad litem's firm, we find no evidence of conflict in the record. The motion filed related to a subpoena to testify at a proceeding in this case. The witness, a doctor, was served with the subpoena four days before the proceeding. The doctor asked the court either to quash the subpoena or to reschedule the testimony one or two days later so as not to cause a severe hardship to patients whose appointments had been scheduled for three months.

We find no evidence admitted in the record that the doctor's interests conflict with those of the child, K.R.K.W. The doctor performed the original examination of the child and testified in the original proceedings to determine if the father had sexually abused the child. Appellant claims the doctor's interests conflict with the child's because the doctor lied in the original proceedings and wants to conceal adverse evidence. To support this claim, appellant again tries to introduce evidence that has repeatedly been excluded as irrelevant or cumulative. We find no evidence in the record that shows any conflict between the doctor and the child that could affect the guardian ad litem's representation of the child. Even if the potential for conflict is admitted for the sake of argument, we fail to see how the guardian ad litem's

representation could have been affected negatively when the motion, filed by another attorney in the firm, was made long after the inadequate representation supposedly occurred. We find no merit in appellant's claim of conflict.

Concerning the phone call, appellant claims that the guardian ad litem spoke with her before being appointed as guardian ad litem. She claims he learned information that caused a conflict in his representation of K.R.K.W. We find no evidence in the record who made the call, who received the call, or the contents of the call. The evidence in the record merely that the call occurred is not sufficient to support appellant's claim of conflict.

We find insufficient evidence in the record to support a claim of conflict of interest. Therefore, we find appellant has not met her burden of showing a substantial possibility that any conflict of interest affected the lawyer's representation. Nichol v. State, 309 N.W.2d 468, 470 (Iowa 1981).

B. Competent representation.

Appellant next asserts the guardian ad litem provided ineffective assistance because he did not represent his client competently. Since "due process requires counsel appointed under a statutory directive to provide effective assistance, we appl[y] the same standards adopted for counsel appointed in a criminal proceeding." In the

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Interest of J.P.B., 419 N.W.2d at 390. Guardians ad litem appointed to represent the best interests of the child in dissolution proceedings or CINA proceedings are "appointed under a statutory directive." See Iowa Code §§ 598.12, 232.2(22) (1993). Under the principles set forth in Strickland, the party claiming ineffective assistance must show (1) that counsel's performance was deficient and (2) that actual prejudice resulted. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

> Judicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. . . . There are countless ways to provide effective assistance in any given case.

Strickland, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694-95 (citations omitted); In the Interest of J.P.B., 419 N.W.2d at 390. The court presumes counsel's conduct falls within the wide range of professional competence. In the Interest of D.W., 385 N.W.2d 570, 580 (Iowa 1986).

Appellant first claims ineffective counsel because the guardian ad litem did not interview K.R.K.W. We disagree. The child was between eighteen months and two years old during the time at issue. The guardian ad litem relied on contact with doctors and counselors who had worked with the

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child. It was reasonable for the guardian ad litem not to interview the child. This choice did not hinder him from representing her best interest at trial or afterward.

Appellant next claims the guardian ad litem was untrained and unprepared to represent K.R.K.W. effectively because he had not been guardian ad litem for any sexually abused child before. Canon 6 of the Iowa Code of Professional Responsibility deals with competence in representation. EC 6-1 states lawyers "should accept employment only in matters which they are or intend to become competent to handle." EC 6-4 states in part,

> If a lawyer has accepted employment in a matter beyond the lawyer's competence but in which the lawyer expects to become competent, the lawyer should diligently undertake the work and study necessary to become qualified.

DR 6-101(A)(2) states a lawyer shall not "[h]andle a legal matter without preparation adequate in the circumstances."

We find no evidence in the record that the guardian ad litem was not competent to handle the legal matters relating to K.R.K.W. Although we do not believe it was necessary for him to become an expert in the medical and psychological aspects of child abuse to be able to represent her best interest, the record provides ample evidence of the hours spent by the guardian ad litem reading materials dealing with the medical and psychological aspects of child abuse. Appellant herself introduced evidence showing he diligently undertook the work and study necessary to become better informed in the

areas at issue. He also relied on K.R.K.W.'s pediatrician and a child abuse expert at the University of Iowa.

We find no credible evidence in the record that the guardian ad litem acted outside the wide range of conduct reasonably considered competent. He reasonably relied on experts who had dealt with K.R.K.W. instead of interviewing the very young child. He spent many hours in study, preparing himself in various aspects of the case. Appellant has failed to meet her burden under the first prong of the Strickland test. Consequently, we need not address the second prong of the test. We agree with the trial court that the guardian ad litem acted competently in representing K.R.K.W.'s best interests.

C. Conflict with the guardian ad litem's personal interests.

Appellant asserts the guardian ad litem lied under oath in order to hide his ineffective assistance and to protect his own reputation and the reputation of others in the case. Specifically, appellant argues that the guardian ad litem lied about whether he had been advised that his client should have more counseling. We have carefully examined the record and find no credible evidence to support this charge.

During the hearing, the guardian ad litem testified that he had recommended no further counseling at one point because he was concerned about repeated invasions of

K.R.K.W.'s privacy. Both the court and several professionals at that time agreed that additional examinations would be harmful or abusive. The use of the words "so many different conferences" and "this kind of activity" have been construed by appellant to say that the guardian ad litem was advised by others to recommend no further counseling for the child. Yet appellant ignores the guardian ad litem's response to her next question. She asked him who the physicians were who had recommended no counseling. He replied,

> No, that's not what I said. I said that I regarded counseling in the same manner as further evaluations. I did not want additional people or an additional person at that point in time invading [K.R.K.W.'s] privacy, and particularly getting into this case because she had been subjected to that by so many others prior to that time.

These statements show the guardian ad litem's obvious concern for the best interests of the child. We find no support for appellant's assertion that the guardian ad litem was lying to cover himself. The trial court was correct in refusing to view this testimony as evidence that the guardian ad litem did not represent his client competently. We agree with the trial court that the guardian ad litem acted competently in representing the best interests of K.R.K.W.

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D. Fraud on the court.

Appellant's last argument concerning the guardian ad litem is that the court ignored evidence that the guardian ad litem perpetrated a fraud on the court, thus invalidating the proceeding. Specifically, she claims (1) the guardian ad litem made ex parte contacts with the court, (2) he failed to ask his client what her wishes were, and (3) he failed to introduce evidence relating to the sexual abuse charge.

Canon 7 of the Code of Professional Responsibility deals with zealous representation. DR 7-104 prohibits communication with one of adverse interest on the subject of the representation. DR 7-110(B) prohibits communication with the court on the merits of the case before the court with some exceptions. Such communications are termed ex parte.

At the hearing, appellant introduced copies of bills submitted by the guardian ad litem for December 1988. The bills show two contacts with a judge, one with the child's father, and several with persons at the department of human services. Appellant characterized these contacts as ex parte, but introduced no evidence concerning the content of the contacts. The mere evidence that contacts occurred is not sufficient to overcome the presumption that the guardian ad litem acted properly. See In the Interest of D.W., 385 N.W.2d 570, 580 (Iowa 1986).

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Appellant next asserts that the guardian ad litem should have consulted with his client about her wishes. EC 7-7 places decision-making authority concerning the merits of the case with the client. EC 7-8 deals with the responsibility of attorneys to keep clients informed so the clients can make responsible decisions.

Guardians ad litem are appointed to represent the interests of one who is legally incapable, whether because of infancy or incompetence, of representing oneself or making necessary decisions. In re Beghtel's Estate, 20 N.W.2d 421, 424 (Iowa 1945); see Iowa R. Civ. P. 12 (1993). The ethical considerations cited by appellant deal with attorneys representing legally competent clients. They are inapposite in this case. The guardian ad litem makes the decisions for the child. The guardian ad litem is not to receive his direction in the case from the child. "It is the best interests of these minor children, not their wishes, which determine the outcome of the case." In the Interest of J.P.B., 419 N.W.2d 387, 391 (Iowa 1988). We agree with the trial court that the guardian ad litem acted properly in representing the child's best interests.

Appellant's last charge against the guardian ad litem is that he failed to introduce evidence of sexual abuse of K.R.K.W. In the hearing, while questioning the guardian ad litem, appellant again tried to introduce evidence she claims proves the child was sexually abused by the father.

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Appellant asserts this evidence should have been introduced by the guardian ad litem when it became available. We find this argument without merit.

The juvenile court addressed the issue of sexual abuse in the initial juvenile proceeding in September 1989. Appellant sought a remand for additional evidence which was denied. In re K.R.W., No. 89-1519 (Iowa App. Dec. 27, 1990). The Iowa Supreme Court denied further review. In the modification proceeding in 1992, appellant again sought to introduce the evidence not admitted in the prior proceedings. The district court refused to admit the evidence and we affirmed that decision. In re Marriage of Winnike, 497 N.W.2d 170, 172-73 (Iowa App. 1992) (holding that issue preclusion applied). We find, therefore, that the guardian ad litem did not act improperly by not presenting the evidence cited by appellant.

III. Dismissing the CINA proceeding.

In March 1989, K.R.K.W. was determined to be a child in need of assistance by stipulations from both her parents pursuant to Iowa Code section 232.2(6)(f). On September 6, 1989, after several days of evidentiary hearings, the juvenile court entered a ruling and dispositional order. In the section on findings, the court stated,

> Due to the danger of kidnapping and emotional abuse, the Court orders that all visitation between [K.R.K.W.] and her mother be closely supervised until such time as [K.K.] has progressed in counseling and the Court can be

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> assured that [K.R.K.W.] would no longer be at risk.

Pursuant to this dispositional order, a case permanency plan was prepared by the department of human services (DHS). This plan was reviewed periodically by the court.

In the September 18, 1991 review, the juvenile court stated,

> The court finds that the goals of the order of disposition have not been met. The limited counseling which [K.K.] has received over the last two years has in no way diminished the extent of acrimony she holds toward this child's father.

(emphasis added).

The court continued supervised visitation, ordered DHS to provide the mother with written guidelines for the supervised visits, and then stated,

> Any attempts made by [K.K.] to circumvent the directions of this Court or the rules set by DHS shall result in the immediate secession [sic] of all visits until further orders of court.

(emphasis added).

In late 1991, because of "the mother's lack of cooperation and continued inappropriate activity during visitation with her child," DHS suspended visitation.

Also in September 1991, the juvenile court granted concurrent jurisdiction to the district court "for purposes of determining final custody, visitation, and child support" in a proceeding to modify the dissolution decree. The juvenile court retained jurisdiction "for purposes of providing supervision of visitation and other services pending the District Court's final decision."

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On March 16, 1992, the district court modified the dissolution decree. It granted sole custody and physical care to the father. The court ordered supervision of the mother's visitation with the child "so as to protect the child from harm or removal from the state of Iowa." It stated the visitation must "be with the approval" of the father. The court also stated, "[a]t the present time, the Respondent has recourse to request visitation through the juvenile court; however, that is not a matter within this court's jurisdiction." We affirmed the modification and the district court's lack of jurisdiction to order DHS to supervise visitation. In re Marriage of Winnike, 497 N.W.2d at 174-75.

On May 28, 1992, the supreme court granted a motion to dismiss K.K.'s pending appeal, In the Interest of K.R.K.W., No. 91-1403. On July 30, 1992 the supreme court denied K.K.'s application to review its action. On September 14, 1992, after an August motion for remand by the State and a resistance by K.K., the supreme court remanded the matter to juvenile court to act on a motion to dismiss the underlying CINA proceeding.

On October 16, 1992, just minutes before the hearing, appellant filed a motion to vacate, a motion for change of venue, a motion for visitation, a motion for grandparent visitation, and a memorandum of law in support of the motion to vacate/change of venue and for visitation. During the hearing, when appellant began to speak about the

motion for a change of venue and to request visitation, the court said,

> I understand that and I will look at [it] then, but we're just talking about the Motion to Dismiss today. . . .
>
> If I do not grant the Motion to Dismiss, then I will set the motion you filed today in for a further hearing, okay. I -- The Supreme Court has told me that I have to rule on the Motion to Dismiss and that's what my mandate is and that's what I'm going to do and that's all I'm going to do.

Appellant immediately responded,

> I have a question though. If you dismiss this case, since the District Court -- I'm not an attorney. I'm trying to understand some of these things. Since the District Court has ordered that I have to go to Juvenile Court to get visitation, if you dismiss this case from Juvenile Court, then how do I get visitation?

The court replied, "I suspect that your remedy is still going to lie with what's in the Supreme Court." (The appeal of the modification of the dissolution). The court refused to rule on any of appellant's motions, stating they would be moot if the court dismissed the CINA proceeding.

On October 28, 1992, the juvenile court issued an order dismissing the CINA proceeding and discharging K.R.K.W. from the jurisdiction of the juvenile court. The court dismissed the proceeding pursuant to Iowa Code section 232.103(4), which states the court may dismiss a CINA proceeding if "the court finds that the purposes of the order have been accomplished and the child is no longer in need of supervision, care or treatment." The court gives several reasons in support of its finding that "to the extent practically possible, the goals of the Juvenile

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Court with regard to protecting this child based on the facts that brought her before this Court have been accomplished."

First, the court found little likelihood of success in attempts to provide the mother and child a relationship that would be in the child's best interests without extensive cooperation from the mother. Appellant has made little progress in counseling in resolving her animosity toward the father. This attitude threatens to poison the child's relationship with her father if visitation is unsupervised.

Next, the court found that the child no longer is showing the problems that caused the initial CINA adjudication. Her father has remarried and is providing "a loving, stable, secure home for the child and she appears to be flourishing."

Finally, the court determined that "[t]he only problem remaining has to do with the contact between the mother and the child. The District Court has dealt with that by requiring supervised visitation. . . . Clearly the assistance of the Juvenile Court is no longer required to provide that protection." We disagree.

Several principles relating to visitation emerge from our case law. Our review of CINA proceedings is de novo. In the Interest of S.W., 469 N.W.2d 278, 279 (Iowa App. 1991). We give weight to the fact findings of the juvenile court, but are not bound by them. Iowa R. App. P.

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14(f)(7). We review the facts and the law and adjudicate rights anew, bearing in mind that our paramount concern is the best interest of the child. Id.; Petition of Deierling, 421 N.W.2d 168, 171 (Iowa App. 1988). Liberal visitation is in the best interest of the child unless the contrary is clearly shown. In re Marriage of Hubbard, 315 N.W.2d 75, 82 (Iowa 1982); In re Marriage of Morton, 244 N.W.2d 819, 822 (Iowa 1976); Spotts v. Spotts, 197 N.W.2d 370, 372 (Iowa 1972); In re Marriage of Drury, 475 N.W.2d 668 (Iowa App. 1991); In re Marriage of Toedter, 473 N.W.2d 233, 234 (Iowa App. 1991); In re Marriage of Athy, 428 N.W.2d 310, 313 (Iowa App. 1988). Visitation is not to be used as a reward or punishment for parents. Lamansky v. Lamansky, 207 N.W.2d 768, 770 (Iowa 1973); Miller v. Miller, 202 N.W.2d 105, 113 (Iowa 1972); Wells v. Wells, 168 N.W.2d 54, 60 (Iowa 1969). We should not deny visitation unless it is detrimental to the child. In re Marriage of Toedter, 473 N.W.2d at 234; Willey v. Willey, 115 N.W.2d 833, 838 (Iowa 1962). Visitation should not be at the discretion of or require the consent of the custodial parent. Smith v. Smith, 115 N.W.2d 421, 425 (Iowa 1966) (citing 2 Nelson, Divorce and Annulment, § 15.26 at 274-76 (2d ed. 1961)).

When DHS stopped appellant's supervised visitation in late 1991, appellant was left with no recourse but to come back to juvenile court to reinstate her supervised visitation. We have already affirmed the district court's

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view that it is without jurisdiction to order DHS to supervise visitation. In re Marriage of Winnike, 497 N.W.2d at 175. Juvenile court is the proper place for appellant to seek supervision for her visitation. While we agree with the juvenile court that the goals of the CINA order of September 6, 1989, substantially have been met and that there is little likelihood of success in appellant's counseling without her cooperation, the juvenile court erred in not ruling on appellant's motion for visitation before dismissing the case.

The juvenile court strongly implied in September 1991 that appellant must return to juvenile court to reinstate supervised visitation if it was stopped by DHS. There is little likelihood that appellant and the custodial father can agree on the court-ordered supervision of visitation without court intervention. We are not unaware of the significant cost incurred by the State in providing DHS supervision of visitation. That cost, however, is not sufficient reason for denying continued supervision in the interim until the court and the parties can agree on private supervision. Since it is appellant's continued intractability in counseling and the perceived risk that she will remove the child from the state, as she did before, that necessitates supervised visitation, we determine appellant should bear the cost of providing that supervision.

Therefore, we vacate the juvenile court's order dismissing the CINA proceeding and remand for the court to rule on appellant's motion for visitation. If the court determines that continued visitation would be in the child's best interest and would not be harmful to the child, it should grant appellant's motion for visitation and order DHS supervision for a period not to exceed six months. During this time, the court should mediate between the parents to aid them in determining a mutually-agreed-upon supervisor for visitation. If the parties are unable to agree on a supervisor, the court shall select one for them.

If the court determines that visitation would be detrimental to the child, it should deny appellant's motion for visitation and DHS or another appropriate petitioner should institute termination proceedings against appellant pursuant to Iowa Code sections 232.111 and 232.116. She should not be left in limbo with neither custody nor visitation and no opportunity to gain visitation.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.