IN THE COURT OF APPEALS OF IOWA

No. 1-399 / 91-584

FILED
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CLERK SUPREME COURT

IN THE INTEREST OF A.Y.H.,
A Child.

R.J.H., III,

Father-Appellant.

Appeal from the Iowa District Court for Scott County, John G. Mullen, Juvenile Court Referee.

The father appeals from the ruling entered by the juvenile court refusing to modify a prior dispositional order concerning A.Y.H., a child in need of assistance. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Gary D. McKenrick of Gomez, May, McKenrick & Kelly, Davenport, for appellant father.

Bobbi M. Alpers, Davenport, for appellant mother.

Bonnie J. Campbell, Attorney General, John M. Parmeter and Charles K. Phillips, Assistant Attorneys General, for appellee State.

Thomas H. Preacher, Bettendorf, guardian ad litem.

Heard by Oxberger, C.J., and Schlegel and Hayden, JJ.

OXBERGER, C.J.

A.Y.H. is a child in need of assistance by virtue of a court order filed January 19, 1990. A.Y.H. was born May 31, 1989. Following a situation where the child was hospitalized for losing 25 percent of her body weight within a three-week period and had suffered from physical bruises, Juvenile Court Referee John G. Mullen adjudicated that A.Y.H. is a CINA because of her mother's neglect and indifference toward her. The court ordered that A.Y.H. be placed in foster care. Her natural father, R.J.H., III, was then incarcerated.

A.Y.H. continues to remain in foster care and the State has petitioned to terminate the parental rights of both her parents.

The matter currently on appeal relates to the motion to modify the dispositional order filed by R.J.H. III, the father of A.Y.H. He asks the juvenile court to place custody of the child with him because he has been released from prison and wishes to have custody of his child. The father is residing with the child's mother.

In denying the father's motion to modify, the district court believed the child should remain in foster care. The father appeals and the mother joins in the appeal. The State resists the appeal. The guardian ad litem recommends the father not be granted custody of the child until such time as he disassociates himself from the mother.

SCOPE OF REVIEW: Appellate review of an order entered after a review hearing in a CINA proceeding is de novo. In re D.S. 437 N.W.2d 587, 587-88 (Iowa App. 1989). While we give weight to the juvenile court's findings of fact, we are not bound by them. Iowa R. App. P. 14(f)(7); In re S.V., 395 N.W.2d 666, 668 (Iowa App. 1986). Of paramount concern is the welfare and best interests of the child. In re D.L., 401 N.W.2d 201, 202 (Iowa App. 1986).

FATHER'S RIGHT TO DUE PROCESS: We first consider whether the father's right to due process under the federal and state constitutions were denied where he was required to prove by a preponderance of the evidence that the child would not be exposed to adjudicatory harm if returned to his custody. The father asserts the State should bear the burden of proving the continued need for placement outside of his custody by clear and convincing evidence. We disagree.

The juvenile court in its order of January 19, 1990, determined A.Y.H. was a CINA within the definition of Iowa Code sections 232.2(6)(b) and 232.2(6)(k). Iowa Code section 232.2(6)(b) (1989) provides:

> 6. "Child in need of assistance" means an unmarried child:
>
> b. Whose parent, guardian, or other custodian has physically abused or neglected the child, or is imminently likely to abuse or neglect the child.

Iowa Code section 232.2(6)(k) (1989) provides:

> k. Whose parent, guardian, or other custodian for good cause desires to be relieved of the child's care and custody.

During this CINA adjudication the father was incarcerated. Although the father was not present at this CINA adjudication, he was represented by counsel. The determination of the juvenile court relied upon clear abuses by the mother, and her request to be relieved of the child's care and custody. In light of the father's representation by counsel, the court's adjudication of A.Y.H. was a determination of both the mother's and father's custody to A.Y.H. The father does not assert his rights to due process under this proceeding were violated. He, however, asserts the same standard of "clear and convincing" evidence required by Iowa Code section 232.96(2), in a CINA proceeding should exist in the review hearing where a parent seeks the return of the child into his or her custody. The father asserts no valid reason has been advanced for shifting the burden and level of proof to the parent seeking to regain the custody of their child at a review hearing. We disagree.

The Iowa Supreme Court has placed the burden of proof in review hearings under CINA proceedings on the parent seeking the return of the parent's child. In re Welcher, 243 N.W.2d 841, 844 (Iowa 1976). A parent must show by a preponderance of the evidence the child would not suffer adjudicatory harm, as defined in Iowa Code section 232.2(6)(1989), if custody of the child were returned to the parent. Id. The rationale for placing the burden of

proof on the parent seeking return of the custody of the child is set forth in Welcher, at 844, which states:

> Obviously a Review Hearing should never be, as it developed here, a re-adjudicication of the original neglect. If it were, a parent might never recover his or her child. . . . When a subsequent hearing involves a parent's efforts to regain custody . . . the proper issue should be whether there has been a change of circumstances since the original hearing which would warrant returning the child to the parent. This would allow the history of the parent to be considered as it bears on the likelihood of the parent having made the adjustments necessary for the child's return, but would not permit relitigation of the prior dependency or neglect determination.
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> As the necessary information is more often within the parent's reach, it should be the parent's burden to prove the change of circumstances. In view of recognized parental rights and the presumption above noted, this proof should not be imposed beyond a preponderance of the evidence. (emphasis added)

Since the United States Supreme Court ruling in Santosky v. Kramer, 455 U.S. 755, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982), the Iowa Supreme Court has addressed differing burdens of proof applied in termination and review proceedings. Iowa law recognizes clear and convincing evidence is constitutionally required in termination proceedings but has not held the State to the same burden of proof in review proceedings. In re Chad, 318 N.W.2d 213, 219 (Iowa 1982). We find the requirement of a parent to meet the burden of proof in review hearings under CINA proceedings, as set forth in In re Welcher, was the appropriate standard for the trial court to apply. We affirm the trial court on this issue.

CUSTODY OF THE CHILD: We next consider whether the juvenile court properly ruled A.Y.H. could not be returned to the father. The juvenile court found, in light of the father's history and attitude towards his wife, A.Y.H. could not at this time be returned to her father's home without being put in danger of some adjudicatory harm. We disagree. The court can never be 100 percent sure the child will not face some risk if returned to a home. In re D.S., 437 N.W.2d 587, 588 (Iowa App. 1989). Central to the determination of this matter is the best interest of the child involved. In re Dameron, 306 N.W.2d 743, 745 (1981). We consider what the future likely holds for the child and look to evidence of the parent's past performance, for that performance may be indicative of the quality of the future care that parent is capable of providing. Id.

There is no argument presented that A.Y.H.'s mother has not been properly determined to be a danger to the child. The father continues to live with the mother. The record indicates that although the child would be living in the same home as the mother, he has made arrangements to address the care of the child through his church, a protective day care, and the Visiting Nurses Association to provide caretakers if necessary. The State urges this court to consider the father's criminal history to infer harm will result if the child is placed in his custody.

The penalty of such crimes, however, does not include the inherent inference that a father should also be denied custody of his child. The record indicates the father has paid the penalty for his offenses. Further, the original determination to remove custody from the parents relied solely upon the conduct of the mother.

The return of this child to the father depends upon his ability to recognize and act in the best interests of the child. The State asserts the father does not believe the mother is any danger to the child. Further, if the father does not believe her mother is a danger to A.Y.H., it is questionable whether he could be trusted to follow any order of the court that the child's mother not be placed in a caretaker role of her daughter. The father, however, stated in the record:

> Q. And you are aware that A.Y.H. was placed in foster care because [the wife] seriously neglected her; is that correct? A. Yes, Sir.
>
> Q. You have no doubt or dispute with the fact that A.Y.H. was in fact seriously neglected by [the wife]? A. That's kind of hard to answer. At -- In one respect I can say that I understand and on the other respect I would say she is not a danger.
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> Q. Was she a danger at the time that it occurred? A. According to the reports that I have read from social services, <u>they would lead me to believe that</u>. I was not there, so I can't --

We find from the record, the State's assertion the father does not recognize concern for the mother is

inaccurate. We are faced in this case with a father seeking custody of his child while simultaneously attempting to retain his marriage. The father asserts the juvenile court's refusal to return A.Y.H. to her father's custody due to the mother's presence in the home ignores the protective authority of the court under Iowa Code section 232.82 (1991). That section provides in relevant part:

> 1. . . . the juvenile court may enter an ex parte order requiring the alleged . . . physical abuser to vacate the child's residence upon a showing that probable cause exists to believe that the presence of the alleged . . . physical abuse has occurred and substantial evidence exists to believe that the presence of the alleged . . . physical abuser in the child's residence presents a danger to the child's life or physical, emotional, or mental health.

The father asks this case be remanded with directions to implement the placement of A.Y.H. in his custody as soon as practicable and under such conditions and supervision by DHS as are in A.Y.H.'s best interests. In light of the court's authority to remove the mother, if necessary, we find merit in the father's request. There is a rebuttable presumption that the best interests of the child are served by custody of the natural parents. In re Chad, 318 N.W.2d at 218. When there is a transfer of legal custody from the parent, every effort should be made to return the child to his or her home. In re N.H., 383 N.W.2d 570, 572 (Iowa 1986). Proper care of a child depends upon a reliable parent who has the ability to manage his or her own life, while

simultaneously acting in the best interest of the child. The prior acts of the mother do not automatically prevent this father from demonstrating his ability to care for the child. The record indicates the father has arranged for the care of the child which is not dependent upon the mother. Those arrangements provide the basis for a change in circumstances which warrant return of the child to the father's custody, provided he continues to demonstrate his ability to act in the child's best interest. We, therefore, remand with directions that A.Y.H. be placed in the father's custody under the supervision of the Department of Human Services. In the event it is necessary, the court may exercise its authority to remove the mother from the home. We reverse and remand.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.