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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN THE INTEREST OF T. M. C. AND A. C. C., Children.	)	Filed April 8, 1983
C. C., Natural Father, Appellant.	)	2-529 / 3-68775

Appeal from Tama District Court, Brent G. Harstad, Judge.

The children's natural father, who is serving a life sentence at the penitentiary, appeals the juvenile court's dispositional order awarding permanent custody of the children to their maternal aunt and uncle in California. AFFIRMED.

Richard R. Vender Mey, for natural father-appellant.

Thomas J. Miller, Attorney General, and Brent D. Hege, Assistant Attorney General, for the State-appellee.

Dennis D. Appelgate of Michelson, Roan & Appelgate, Toledo, for the maternal aunt and uncle-appellees.

Mark Havlik, guardian ad litem, Tama, for the children.

Considered by Oxberger, C.J., and Snell and Johnson, JJ. Donielson and Schlegel, JJ., take no part.

OXBERGER, C.J.

The two children in whose interests this case is brought were born in 1973 and 1974. Pending resolution of a dissolution proceeding, their mother was granted temporary custody of them in October 1979. On April 6, 1980, the mother and two other people were found dead at the mother's apartment in Tama, Iowa. The father, appellant herein, was subsequently charged with and convicted of three counts of first-degree murder and is currently serving three concurrent life terms at the Iowa State Penitentiary.

While the criminal prosecution against appellant was pending, the county attorney filed petitions alleging that T.M.C. and A.C.C. were children in need of assistance. At a pretrial conference on the petitions, all parties present stipulated that the children were in need of assistance. These parties included the State; the children's maternal aunt, uncle, and grandparents; the children's paternal grandparents; the children's paternal aunt and uncle; the children's guardian ad litem; and the Department of Social Services. Appellant was not present and was not represented by counsel at this proceeding.

Appellant was present with counsel at a dispositional hearing on June 30, 1980, as were the children's paternal aunt and uncle, the Chancellors, who live in Iowa, and their maternal aunt and uncle, the McClains, who live in California. Appellant and the Chancellors requested that custody of the children be placed with them, while the McClains, requested that custody be placed with them. After hearing testimony, the juvenile court awarded temporary custody to the McClains, aunt and uncle, subject to visitation rights in Chancellors.

Appellant and the Chancellors appealed from the original dispositional order. This court affirmed the temporary custody award to the McClains and uncle and

remanded to the juvenile court "to make a permanent custody determination at the appropriate time." In the meantime, the children have been residing in California with the McClains.

In February 1982, at a custody hearing, the juvenile court denied appellant's request that the children and the McClains be present at the hearing. Over objections, the court allowed testimony via telephone from Mrs. McClain, a psychiatrist who had been treating the children in California, and a California social worker. Mrs. McClain testified about a change of residence, the fact that they have an unlisted telephone number, the children's schoolwork and friends, and behavioral problems that one of the children has been experiencing. The social worker gave positive testimony about the household in which the children live and the relationships of the McClains with the children. The psychiatrist testified at some length regarding her treatment of the children. The psychiatrist concluded that T.M.C. should continue to be isolated from her father and her father's family due to the child's severe depression and grief reaction from her mother's death.

Appellant testified that he wanted custody of the children transferred to the Darrows, his sister and her husband, who live in Illinois. He asserted that the aunt with whom the children are presently residing was vindictive toward him and was turning the children against him. He wanted the children placed with the Darrows so that they could visit him in prison. He also complained that the children were not allowed to receive letters he sent them or to send letters in response.

Although the Darrows did not file a petition as parties, they testified concerning their residence, their children, their life-style, and their desire for custody of T.M.C. and A.C.C.

Considerable testimony was elicited concerning the McClains' alleged

attempts to isolate the children from appellant and his family. Mrs. McClain admitted that upon advice of the children's psychiatrist, she had limited the children's contact with appellant's family.

On May 19, 1982, the juvenile court awarded permanent custody of the children to the McClains, citing Iowa Code section 232.101. The court concluded that either the Darrows or the McClains "could provide decent care for these children," but that it would not be in the best interests of the children to be removed from the environment in California in which they had been living for two years. The court also concluded that it was not in the best interests of the children to visit with their father or to communicate with him, in view of the deep feelings they had with regard to the loss of their mother at the hands of their father. Noting that Mrs. McClain had prevented the children from communicating with their father and visiting with his relatives in violation of prior orders of the court, the court concluded that although it did not condone such action, it was based upon advice of the children's therapist and was, therefore, in essence, for good cause.

This appeal was brought by the father, but the Darrows are not parties to the appeal.

I. Scope of Review

Our review is de novo. In Interest of Miller Children, 228 N.W.2d 60, 62 (Iowa 1975); In Interest of Thompson, 241 N.W.2d 2 (Iowa 1976). We give weight to the juvenile court's findings, but are not bound by them. In Interest of Meek, 236 N.W.2d 284, 289 (Iowa 1975). Our primary concern is to determine what the best interests of the children are. Iowa R. App. P. 14(f)(15).

II. Validity of the "CHINA" Adjudication and Subsequent Proceedings

Appellant argues that because he was not present or represented by counsel at the adjudicatory hearing of April 21, 1980, and had no part in the stipulation

providing that his children were "children in need of assistance," the adjudication and all subsequent juvenile court proceedings concerning his children are invalid.

In an earlier appeal by this appellant, we affirmed the award of temporary custody of the children to the McClains. At the same time, we vacated that portion of the juvenile court's order which stated that the temporary custody order should be made permanent if appellant was convicted of his wife's murder. We remanded to the trial court "to make a permanent custody determination at the appropriate time." In the Interest of T.M.C., No. 3-65281, slip. op. at 2 (Iowa Ct. App. May 26, 1981). At that time, we found that "the children were stipulated to be children in need of assistance under chapter 232, The Code." Id. at 1.

Appellant had not alleged error in his earlier appeal with regard to this issue. Until the instant appeal, he raised no objection to the stipulation that his children were children in need of assistance. His failure to request rehearing on the issue, or to raise or argue the alleged error in his first appeal, waives the issue. Zeman v. Canton State Bank, 211 N.W.2d 346, 350 (Iowa 1973). The determination that these children were stipulated to be children in need of assistance under Iowa Code chapter 232 has thus become the law of the case.

> It is the settled rule that the decision of this court upon a prior appeal becomes the law of the case and is to govern upon a subsequent trial thereof in the district court and upon another appeal unless the facts before the court upon subsequent trial are materially different from those appearing upon the prior trial.

Sauer v. Scott, 238 N.W.2d 339, 342 (Iowa 1976), citing Schroedl v. McTague, 169 N.W.2d 860, 863 (Iowa 1969).

The state contends that the hearing upon remand was a review hearing as provided by Iowa Code section 232.102(6)(1983). In In Interest of Blackledge, 304 N.W.2d 209, 213 (Iowa 1981), the supreme court held that modification of an order cannot be made by a court on its own motion unless hearing is waived or there has

been appropriate notice and hearing. In this case, there was no motion, no notice, and no hearing directed to modification of the earlier disposition of the custody of these children. At such a review hearing, the court had only three alternatives: to return the children, to extend the placement, or to initiate a termination proceeding. As the court said in Blackledge, "[a] new transfer of legal custody is not among the alternatives." Id. The first alternative was obviously not within the realm of possibility, since the children's natural mother had been murdered and their father was in prison for her murder.

We agree with the State's position on this issue, for the supreme court's analysis in Blackledge clearly controls this case. The only question remaining is whether the court was justified in extending the placement with the relatives in California.

Even if we read the evidence in a light most favorable to the appellant, it is clear to us that he has failed to establish that the best interests of these children would be served by modifying the original dispositional order.

III. Procedures at the Hearing

Appellant argues that the court should have required the custodian and children to travel from California to Iowa to be physically in the courtroom. He also argues that the court erred in permitting witnesses and a party in California to testify by telephone, contending that this procedure denied him his right of confrontation and cross-examination and that the testimony thus received was hearsay.

We disagree. Iowa Code section 232.37(1) empowers the court to issue a summons requiring the child and any person who has custody or control of the child to appear before the court for an adjudicatory hearing unless such persons appear voluntarily. However, sections 232.38(1) and (2) provide that juvenile hearings or proceedings may take place without the presence of the parent,

guardian, or custodian of the child in whose behalf the proceedings are taking place. Moreover, appellant has not shown that he was prejudiced by the absence of the children and their custodian.

The court allowed a child psychiatrist who had been treating the children and a foster care worker, as well as the children's maternal aunt and custodian to testify from California by telephone. Each of these persons was identified and sworn in by a California official qualified to administer oaths. All of these persons testified and were cross-examined by appellant's counsel.

In Aldape v. State, 307 N.W.2d 32, 43 (Iowa 1981), the supreme court said:

> The principal interest secured by the confrontation clause of the sixth amendment to the United States Constitution is the right of effective cross-examination. [citation] In determining whether the right of confrontation has been violated, the " 'relevant factual inquiry is whether, under the circumstances,' the [fact finder] has been deprived of a satisfactory basis for evaluating the truthfulness of the prosecution witness's testimony." [citations]
> Although the opportunity to observe a witness' demeanor can be an important factor in ascertaining the witness' credibility, under the circumstances, we are convinced that the trial court had a satisfactory basis for evaluating the testimony of the two Texas witnesses. The witnesses were properly sworn before they testified and were thoroughly cross-examined by defense counsel.

Aldape concerned a criminal trial in which the defendant was accused of first-degree murder. The question was whether testimony taken by telephone from witnesses who were in Texas at the time of the trial was admissible. The Iowa Supreme Court held that it was.

The right of confrontation is derived from the sixth amendment, which applies to criminal or quasi-criminal proceeings, while a CHINA proceeding is neitner criminal nor penal in character. "[I]t is a special proceeding, the objective of which is to determine the child 's best interest and welfare." In Interest of Long, 313 N.W.2d 473, 478 (Iowa 1981).

Even if we assume, as the court did in Long, that confrontation rights are applicable to CHINA proceedings, it is nevertheless true that the legislature can alter the customary rules of evidence so long as any changes it makes do not violate fundamental rights. Id., citing Harter v. State, 260 Iowa 605, 616, 149 N.W.2d 827, 834 (1967). The court in Long concluded that "where the purpose of confrontation is secured, that is, an opportunity for cross-examination, the right of confrontation is not violated." Id. at 479. Appellant was granted the right of cross-examination and exercised that right. The hearing conducted partially by telephone is not beyond the bounds that the supreme court has often recognized as proper in juvenile proceedings. "The provisions of chapter 232 seek to retain the advantages of an informal hearing in juvenile court while providing safeguards which will guarantee each party his or her fundamental rights to a fair hearing." Id., citing Harter, 260 Iowa at 616-17, 149 N.W.2d at 834.

As for hearsay, the court has sanctioned the admission of hearsay evidence so long as it is "relevant and material; its probative value must substantially outweigh the danger of unfair prejudice; the conveyor's lack of personal knowledge may be proved to affect its weight." Long at 479. See Iowa Code § 232.96(6)(1983).

> Such evidence, which under ordinary rules of evidence, would be excluded as hearsay, is made admissible by statute in a juvenile proceeding, leaving the nature of the evidence to be considered as it affects its probative value rather than its admissibility. Stated otherwise, objections to such evidence are to be considered in relation to the weight to be given the evidence rather than its admissibility. [citation] This is a process of sifting the evidence akin to that employed in equity cases. [citation] We believe that procedural due process is flexible enough to sanction this sifting process, wherein we rely on the juvenile court judges to discern probative value absent the safeguards provided by the hearsay rule. [citation].

Long at 479-80.

We do not find that appellant's rights were adversely affected by the procedures employed by the court at the hearing.

IV. Placement of the Children

Appellant argues that the evidence is overwhelming that placement of the children with the McClains in California was not in the children's best interests. On our de novo review, we find no error in the court's disposition of this case, and agree with its conclusion that the best interests of these children were served by permitting them to remain with the McClains. Consequently, we affirm.

AFFIRMED.