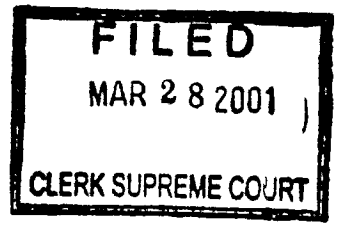
**IN THE COURT OF APPEALS OF IOWA**

No. 0-820 / 00-465
Filed March 28, 2001




**IN THE INTEREST OF S.H., Minor Child,**

**L.R., Mother,**
Appellant.

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Appeal from the Iowa District Court for Black Hawk County, Jeffrey L. Harris, District Associate Judge.

The mother of minor child S.H. appeals a juvenile court ruling denying her request for unsupervised visitation. **REVERSED AND REMANDED.**

James G. McCullagh, Cedar Falls, for appellant.

Thomas J. Miller, Attorney General, Janet L. Hoffman, Assistant Attorney General, and Steven J. Halbach, Assistant County Attorney, for appellee State.

Linnea Nicol, Juvenile Public Defender, Waterloo, guardian ad litem for minor child.

Diane Larsen, Waterloo, for father S.H.

Considered by Streit, P.J., and Hecht and Vaitheswaran, JJ.

**STREIT, P.J.**

Sam H. was allegedly physically abused by his mother when he was only a few weeks old and has been out of her custody for the last five years. Because of the positive developments in this case, we reverse the juvenile court's order denying his mother's request for unsupervised visitation.

***I. Background Facts & Proceedings.***

Lori R. and Samuel H., Sr. are the parents of Samuel H., Jr. ("Sam"), born February 29, 1996. When Sam was three weeks old, he was hospitalized with a skull fracture and accompanying subdural hemotoma. Lori told hospital personnel Sam may have hit his head while she was changing his diaper. The juvenile court, suspecting Sam had sustained his injuries in a nonaccidental manner, had Sam removed from his parents' custody. Shortly thereafter, Lori told investigators Sam had actually fallen out of a shopping cart onto a concrete floor. Lori—who has acknowledged lying about Sam's injury was wrong—explained she had done so because she feared "they'd take [Sam] away."

In February 1997 Sam was adjudicated a child in need of assistance pursuant to Iowa Code section 232.2(6)(b)[1]. The juvenile court stated no credible evidence supported Lori's shopping cart story. It further concluded Lori had nonaccidentally inflicted the injury.[2] Although Lori never appealed the juvenile

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[1] The statute provides the following: "*Child in need of assistance*" means an unmarried child: Whose parent . . . has physically abused or neglected the child, or is imminently likely to abuse or neglect the child." Iowa Code § 232.2(6)(b) (1995) (emphasis original).

[2] The juvenile court's finding following the CINA hearing has profoundly affected the remainder of this case. For example, following the termination hearing, another juvenile court judge made the following finding:

court's finding, since April 1996 she has adhered to her claim she did not physically abuse her son.

In May of 1998 Sam was placed in the long-term care of his maternal grandmother from South Dakota after the juvenile court determined the termination of Lori's and Samuel's parental rights was not in his best interests at that time. Lori currently is allowed only supervised visitation with her son.[3] The juvenile court has denied her request for unsupervised visitation. She appeals.

***II. Standard of Review.***

Our review is de novo. *In re D.S.*, 563 N.W.2d 12, 14 (Iowa Ct. App. 1997). We give weight to the fact findings of the juvenile court, but we are not bound by those findings. *Id.*

***III. The Merits.***

As was noted above, Lori has requested she be allowed to have unsupervised visitation with her son, Sam. To justify this modification of the juvenile court's permanency order, Lori must show the circumstances have so

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> In cases involving injuries with no independent eyewitnesses, a great deal rests on the medical opinions as to causation of the injury. Although this Court, in reviewing the evidence, finds that the medical opinion is not clear and convincing, the DHS and Judge Clark has [sic] made a finding that the [shopping-cart] story is not a credible explanation for the severe head trauma. At this juncture, therefore, [Lori] is the founded perpetrator of physical abuse and stands charged with felony child endangerment. Given this set of facts, the Court finds that it cannot reasonably consider reunification to [Lori] at this time given those circumstances. Without further legal resolution of the underlying child abuse investigation and further resolution of the criminal charges, the Court finds [Lori] cannot be considered a primary caretaker.

[3] Samuel and Lori separated sometime after Samuel's October 1997 domestic abuse assault of Lori. Samuel currently has liberal unsupervised visitation with Sam. An attempt to implement a trial placement of Sam with his father was unsuccessful.

materially and substantially changed that unsupervised visitation is in Sam's best interest. *See In re C.D.*, 509 N.W.2d 509, 511 (Iowa Ct. App. 1993).

Lori has satisfied her burden. In its May 1998 permanency order, the juvenile court stated Lori could not have unsupervised contact with Sam given the physical abuse allegations against her.[4] No new evidence disproving Lori abused Sam has been forthcoming—indeed, in March 1999 Lori entered an *Alford* plea to aggravated misdemeanor child endangerment.[5] However, in January 2000 a psychologist evaluated Lori to determine if she is likely to be dangerous to Sam. The psychologist noted that, during the evaluation, Lori showed "no evidence of inappropriate anger, depression, excessive anxiety, or other extreme emotions." Moreover, after administering various tests, he concluded, "Since [Lori] does not seem to have any of the characteristics seen in child abusing parents, I do not see her as a danger to her son, and would therefore recommend unsupervised visitation."[6] In addition to this favorable

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[4] The juvenile court kept its permanency order intact after the April 1999 permanency review hearing. It denied Lori's request she be allowed to have supervised visitation with Sam under Samuel's supervision, finding it was "inappropriate under the circumstances." The juvenile court did not clarify what these circumstances were.

[5] Lori was initially convicted of felony child endangerment after a October 1997 jury trial. She was granted a new trial, however, and she entered the above-mentioned *Alford* plea to aggravated misdemeanor child endangerment. Significantly, an *Alford* plea permits "a defendant to make a voluntary and intelligent decision to plead guilty to a crime without admitting participation in the underlying facts which constitute the crime." *State v. Klawonn*, 609 N.W.2d 515, 520 (Iowa 2000) (citing *North Carolina v. Alford*, 400 U.S. 25, 37-38, 91 S. Ct. 160, 167-68, 27 L. Ed. 2d 162, 171-72 (1970)). "[It] is a guilty plea in all other material respects." *United States v. Tunning*, 69 F.3d 107, 111 (6th Cir. 1995).

[6] The State contends the psychologist's February 2000 report merely reiterates what the same psychologist said in the November 1997 report he prepared for this case. However, the psychologist was addressing a different issue in the later report and administered different tests.

recommendation, there is evidence Lori is receptive to the services offered to her, talks to Sam on the telephone two to three times per week, and interacts appropriately with Sam during their frequent supervised visits. The State has not offered any evidence to the contrary. We cautiously find that—five years after the incident precipitating this case—Lori can take the small step from having supervised visitation with Sam to unsupervised visitation with him.[7]

The State argues this modification is inappropriate given Lori's refusal to acknowledge her responsibility for Sam's injuries. The juvenile court also apparently believes such an acknowledgment would be the only change that would merit a modification of its permanency order. As the juvenile court stated in its order denying Lori's request for unsupervised visitation,

> Until such time that [Lori] acknowledges the abuse, no meaningful change can occur and [Sam] will continue to remain at risk for future abuse. [Lori's] posture continues to prevent her from being able to acknowledge the imminent danger of abuse that [Sam] could suffer under her care. As such, [Lori] is unable to take the steps to fully remedy or address the circumstances which would cause the abuse.

We agree with the premise to the State's and juvenile court's respective positions: When a parent and her child have been separated because of the parent's abuse of the child, the parent's willingness to acknowledge the abuse is generally an important step in resolving the underlying problem. *See In re H.K.R.*, 433 N.W.2d 46, 50 (Iowa Ct. App. 1988). However, Lori's refusal to

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[7] The current visitation can be supervised by Lori's sister, mother, or any other person approved by the department of human services. According to the February 2000 psychological report, Lori spent time with Sam on a daily basis throughout January 2000. Sam, who normally lives with Lori's mother in South Dakota, was staying at Lori's sister's residence during this time period.

acknowledge she abused Sam five years ago should not be outcome-determinative in this case—especially when the State has not presented any concrete evidence showing why such an acknowledgment is critical under the existing circumstances.

Requiring Lori to acknowledge she abused Sam puts her in an unenviable situation: On the one hand, Lori could continue to adhere to what she apparently believes to be the truth, namely her shopping cart story. The juvenile court has already indicated this choice prevents her from enjoying unsupervised visitation with Sam. On the other hand, Lori could acknowledge she abused Sam even though she believes she did not. This could prompt the juvenile court to grant her unsupervised visitation—or it could reinforce the juvenile court's current belief she poses such a threat to her son's well-being she cannot be left alone with him.

More significantly, requiring Lori to acknowledge she abused Sam before making any modifications to the permanency order is not in Sam's best interest. Sam was removed from Lori's custody when he was less than a month old. Lingering questions about what actually happened to him in March 1996 have kept him out of her care for the past five years. If reunification is a viable goal in this case, steps must be taken to achieve that goal. Something must be done to end the current impasse. The above-described positive developments in this case merit a modification to the permanency order.

In summary, Lori's road to increased contact with Sam should not remain obstructed by her refusal to acknowledge she abused him five years ago. Because unsupervised visitation is in Sam's best interest, we reverse the juvenile

court's order denying Lori's request for such visitation and remand so the juvenile court can establish appropriate guidelines for the visitation.

**REVERSED AND REMANDED.**