

FILED**JUN 28 1983**

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA**IN THE INTEREST OF****S.A.M.,**

A child.

T.L.M.,

Appellant.

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Filed June 28, 1983

3-121
3-69401

Appeal from Jasper District Court - Thomas Mott, Judge.

The natural mother of this minor child appeals the juvenile court's order adjudicating the child in need of assistance, the subsequent dispositional order transferring custody of the child to the department of social services for placement in foster care, and the denial of the natural mother's motion for new trial.

REVERSED AND REMANDED.

Randal B. Caldwell of Caldwell, Caldwell & Caldwell, Newton, for natural mother appellant.

John E. Billingsley of Salisbury & Larson, P.C., Newton, guardian ad litem, for the child.

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

Heard en banc.

DONIELSON, J.

The natural mother of this minor child appeals the juvenile court's order adjudicating the child in need of assistance, the subsequent dispositional order transferring custody of the child to the department of social services for placement in foster care, and the denial of the natural mother's motion for new trial. On appeal, the natural mother asserts that: (1) service of notice was untimely and defective under Iowa Code section 232.88 and constitutional due process requirements, and the juvenile court therefore lacked jurisdiction over these CHINA proceedings; (2) even if, arguendo, the juvenile court had jurisdiction, the defective notice was prejudicial to the natural mother, and she is therefore entitled to a new hearing; and (3) the natural mother was denied her statutory and constitutional rights to counsel during the CHINA proceedings, and is therefore entitled to a new hearing. We reverse and remand.

Our scope of review is de novo. Iowa R. App. P. 4.

I.

This matter came to the attention of the authorities when T.M., the natural mother of the two-year-old child in issue, S.A.M., was arrested on a charge of false use of a financial instrument. The arrest took place on September 30, 1982, whereupon a social worker was called to look after the child. The social worker discovered that the child's diapers, and the stroller into which the child was tied, were soaked with urine. The child was suffering from severe diaper rash, characterized by blisters and open sores. The child was taken into temporary custody, washed, given medical care, and placed in a foster home.

On Friday, October 1, a CHINA petition was filed. T.M., who was still in jail, was apparently orally told that the child was in foster care and that legal proceedings would follow. T.M. was released on her own recognizance on Monday, October 4th. She went to the department of social services to pick up her Aid to

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Dependent Children check and inquired about S.A.M. She spoke to Cathy Thompson, a social worker, who informed T.M. that there would be "a hearing coming up and that it was important for her to have an attorney for that hearing." T.M. was not told the date or approximate date of the hearing but was told that, to secure appointed counsel, she would need to go to the county attorney's office.

T.M. went to the county attorney's office the same afternoon and picked up the necessary papers. It was there that she spoke to Ann Mack, who obviously realized that T.M. was somewhat confused about the fact that she needed two different attorneys appointed, one for the criminal charges pending against her and one for the juvenile matter. It is also clear from the testimony that the subsequent hearing that Ann Mack did not ensure that T.M. understood her need for separate counsel for these matters and did not explain the CHINA proceeding or tell T.M. where S.A.M. was or how T.M. could visit the child. T.M. was told only that a hearing was necessary to decide what would happen to the baby and that the judge would make the final decision. Ann Mack did not tell T.M. when the approximate date of the hearing would be, nor did she inform T.M. that notice of the hearing would be personally served upon her. T.M. did not return the forms for appointment of counsel.

On Tuesday, October 5, a deputy sheriff unsuccessfully attempted to serve notice of the scheduled October 11th hearing on T.M. The sheriff could not locate T.M., apparently because she had moved from the trailer home in which she had been living. The following day, Ann Mack visited two friends of T.M. and told them that if they found out where T.M. was, to let her know or to have T.M. contact her at the department of social services office. She apparently did not tell them of the hearing date.

On Sunday night, October 10th, T.M. went to her father's home and was told by him that the sheriff's office had been trying to contact her. T.M. had her

father drive her to the sheriff's office where she was served with notice of the hearing at 9:30 p.m. T.M. immediately called Cathy Thompson and asked her about the hearing, telling her that she did not have counsel but wanted a lawyer before going to the hearing. The State stipulated that T.M. did all that she could do following receipt of notice to secure counsel before the hearing was scheduled to begin at 2:30 the following day, the 11th.

T.M. appeared at the hearing without counsel. She claimed she was prejudiced by the late notice and the fact that she was not represented by counsel. She requested a continuance, which was denied. The court found that reasonable and diligent efforts to obtain service had been made and that T.M. had made herself unavailable for service. The court also found that T.M. had a reasonable opportunity to obtain counsel and had waived her statutory right to counsel.

Testimony on the substance of the CHINA petition indicated that the child may have been the victim of an attempted assault by T.M.'s boyfriend, that the child was often not appropriately dressed or adequately fed, that the child's severe diaper rash was a chronic condition, and that T.M. often wandered the streets with the child because they had no place to go. The court then ruled that the child was in need of assistance and set a dispositional hearing for two weeks later.

After T.M. subsequently applied for appointment of counsel, her counsel filed a motion for new trial, raising the right to counsel and notice issues. T.M.'s counsel appeared at the dispositional hearing, but T.M. did not. After hearing arguments of counsel, the court denied the motion for new trial and ordered that the child remain in the custody of the department of social services. By nunc pro tunc order the court subsequently made clear that the child was to be placed in foster care. This appeal followed.

II.

Because we find appellant's assigned errors to be closely related, we shall

consider them together. Basically, she contends that notice of the child in need of assistance (CHINA) hearing was defective and that she was prejudiced as a result.

We agree.

In In re Interest of Hewitt, 272 N.W.2d 852, 855-56 (Iowa 1978), the Iowa Supreme Court held that notice in child in need of assistance proceedings is jurisdictional and must be strictly scrutinized and enforced to satisfy both the Iowa statutory test as well as the test of due process under the Fourteenth Amendment. To determine whether the notice survives such careful scrutiny, the court relied, in part, on In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1966):

We quoted Gault principles in the case of In re Meyer, 204 N.W.2d 625, 626 (Iowa):

"* * * Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.' * * * Notice at that time is not timely; and even if there were a conceivable purpose served by the deferral proposed by the court below, it would have to yield to the requirements that the child and his parents or guardian be notified, in writing, of the specific charge or factual allegations to be considered at the hearing, and that such written notice be given at the earliest practicable time, and in any event sufficiently in advance of the hearing to permit preparation." (Emphasis added) 387 U.S. at 33, 87 S. Ct. at 1446, 18 L. Ed. 2d at 549.

Id. at 856.

We believe this holding applies equally to the new CHINA notice provisions. Iowa Code §§ 232.37 and .88. The notice given in the instant case falls short of this requirement. The State argues that section 232.38 allows the juvenile court to obtain jurisdiction upon a finding that T.M. had "actual notice" of the hearing. We need not decide whether "actual notice" would satisfy the notice requirement since we find that T.M. had no actual notice of the hearing in the instant case. She was told that there would be a hearing in the future, but was never told when or even given an approximate date. The first time that she became aware that

the hearing would be held October 11th was on the evening before when she received the original notice and summons. This notice was far from being "sufficiently in advance of the hearing to permit preparation," including the chance to secure counsel to assist in such preparation. Therefore, we need only consider the appropriate relief under these circumstances.

T.M. argues that her appearance at the hearing was basically a special one to contest jurisdiction and, therefore, we should remand with directions that the CHINA petition be dismissed. The State argues that the appropriate remedy is vacation of the adjudicatory and dispositional orders and a remand for further proceedings following a notice of hearing, rather than a reversal with the requirements of new personal service upon the natural mother.

In Hewitt, the court held that Iowa Rule of Civil Procedure 66 did not apply in juvenile proceedings. Hewitt, 272 N.W.2d at 859. However, the court noted specifically that it was not holding "that a person does not generally appear if he announces, orally or in writing, that he appears or if he actually participates as a party in the proceeding other than by challenging the court's jurisdiction." Id. It appears that the facts of each case must be analyzed to determine whether, on the record, the respondent's intent was to make a special appearance to contest jurisdiction. If the respondent appears and participates on the merits, improper notice may be waived. See Hewitt, Id., at 857. But in the instant case, T.M. objected to proceeding on the ground that she did not have counsel and was not prepared; the very reason cited in favor of strictly construing the notice requirements. Prejudice is presumed when notice is defective. Id.

In the earlier stages of these proceedings T.M. did no more than articulate to the court that, due to the late notice she was unable to secure counsel to protect her interests. We cannot hold, therefore, that jurisdiction attached. Accordingly, we remand the case to juvenile court with directions that the CHINA

petition be dismissed. The dismissal is without prejudice to further proceedings in the case. However, the present proceedings in the juvenile court following the filing of the petition cannot be used in future proceedings.

REVERSED AND REMANDED.