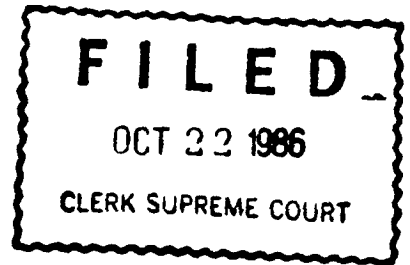


IN THE COURT OF APPEALS OF IOWA



IN THE INTEREST OF K.M.C.,
A Child,

T.C. and S.C., Natural
Parents,

Appellants.

)
)
)
)
)

Filed October 22, 1986

6-301
86-216

300

Appeal from the Iowa (Juvenile) District Court for Des Moines County
(J #2423) - Gary J. Snyder, District Associate Judge.

The parents of a juvenile appeal the juvenile court's decision to leave
the child in foster care under the statutory criteria set forth in Iowa Code section
232.2(6). **REVERSED.**

Lloyd H. Wolf of Napier, Wright & Wolf, Fort Madison, Iowa, for appellants.

David Arthur Adams, Burlington, Iowa, guardian ad litem, for appellee
child.

Heard by Donielson, P.J., Schlegel, and Hayden, JJ.

SCHLEGEL, J.

The parents of a juvenile appeal the juvenile court's decision to leave the child in foster care under the statutory criteria set forth in Iowa Code section 232.2(6). We reverse.

The child in question, born in 1976, was removed from the parents' house in 1977 when there was found to be a widespread pattern of sexual abuse in the family. The child is not thought to have been sexually abused but was removed from the family when eight other minor children were removed. In 1981 the child was returned to the parents but removed that same year based upon sexual abuse reports of two brothers by an older half-brother. In 1984 the juvenile court ordered the county attorney and the Department of Human Services to clearly set out to the parents what was required of them to regain their child. A "contract" was prepared and signed by the Department and the parents after consultation with the attorney for the child. The contract set forth the standards that would have to be met in the parents' home before the child could be returned there. These standards related to housing, nutrition, cleanliness, clothing, budget, counseling, education, activities, and discipline.

At the review hearing in 1985 the parents argued that they had fulfilled the terms of the contract and the child should be returned to them. The county attorney and the Department contended at this hearing, relying on a report from the Child Development Clinic in Iowa City, that the child should be placed in an institution for an intense period of evaluation. The court disagreed with the need for further testing and ordered the child returned to the foster home. The court at that time ordered that: the foster family work toward the goal of returning the child to her natural parents; weekly visits with the juvenile and the natural parents continue as well as longer visits; the natural parents participate in parental training programs; the natural parents work on their

communication skills; the natural parents involve the child in outside activities; they learn to dress the child appropriately; and they continue counseling and participation with the various services available to them.

At the review hearing in January 1986, the county attorney and the Department of Human Services recommended that since the parents had complied with what had been required of them, the child be returned to them. The guardian ad litem did not believe that the natural parents had complied with what was required of them. The guardian ad litem further argued that the increased visitation had a negative effect on the child's school work and behavior. The court found the evidence presented at the hearing established that the parents were unable to avoid the possibility of abuse and injury by the brother towards the child; the child was developing a sense of inferiority; the child was not showing appropriate social conduct; the child was not clean and free from body odors; and the child wore inappropriate dress to school. The court said it would not "experiment" with placement in the parental home during the school year. It further said that unless the evidence were to change "dramatically," before the school year began, the child would continue to be placed in the foster home.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4; In Interest of Welcher, 243 N.W.2d 841, 843 (Iowa 1976). Our responsibility is to review the facts as well as the law and to determine the rights anew from the credible evidence on properly presented and preserved issues. While we give weight to the findings of the trial court, especially where the credibility of witnesses is involved, we are not bound by them. Iowa R. App. P. 14(f)(7).

As the supreme court pointed out in In Interest of Welcher, a review hearing is not a readjudication of the original neglect; rather, the proper issue is whether there has been a change of circumstances which would warrant returning the

child to the parents. 243 N.W.2d at 844. It is the parents' burden to prove the change in circumstances by a preponderance of the evidence. Id. The paramount consideration is the best interests of the child but the presumption that a child's best interests will be served by leaving it with its parents is not conclusive. Id. at 843. We approach this appeal with these principles in mind.

Iowa Code section 232.102(6) (1985) states that at a review hearing "The placement shall be terminated and the child returned to the child's home if the court finds by a preponderance of the evidence that the child will not suffer harm in the manner specified in section 232.2, subsection 6." The trial court, in looking to section 232.2(6) found that the parents had not carried their burden in showing that harm as specified in 232.2(6)(b) and 232.6(f) would not occur. Section 232.2(6)(b) states that a child is in need of assistance:

Whose parent, guardian or other custodian has physically abused or neglected the child, or is imminently likely to abuse or neglect the child.

Section 232.2(6)(f) states that a child is in need of assistance:

Who is in need of treatment to cure or alleviate serious mental illness or disorder, or emotional damage as evidenced by severe anxiety, depression, withdrawal or untoward aggressive behavior toward self or others and whose parent, guardian, or custodian is unwilling or unable to provide such treatment.

The issue we are asked to decide is whether the court properly applied the statutory criteria.

The record does not support the conclusion that the child is imminently likely to suffer abuse or neglect at the hands of the parents. No one contends that the parents themselves will do any physical harm to the child. It is conceded that the parents have shown measurable progress in their ability to care for her. The guardian ad litem and the court based their conclusions of harm on two grounds. First, that the brother poses a risk of causing physical injury to

the girl. This conclusion is simply not borne out by the record. The girl was hit and bruised by the brother on one occasion. However, testimony from Jackie Hassel, a social worker for the Department of Human Services working with the parents, testified that the brother and sister had a caring, loving relationship and that they get into scuffles just like all other children. The girl herself testified that she gets into fights with her brother but when it happens they are separated by the parents. Alan Fabel, a psychiatric social worker at the Southeast Iowa Mental Health Center who was working with the parents, testified that the brother was sorry about the incident, the girl misses her brother, and the brother and sister seem to be enjoying a "good bonding." The trial court concluded that the parents "would be unable to avoid this possibility of abuse and injury." The statute does not look to the possibility but rather the imminent likelihood of abuse or neglect. Given the evidence, there is not an imminent likelihood of abuse or neglect caused by the parents not controlling the brother.

The court further concluded that under 232.2(6)(b) the girl would suffer emotional damage if returned to the natural parents. The court said that the evidence shows that the daughter is overly aggressive, potentially a threat to her peers, and is developing "a sense of inferiority or lack of self-worth which results in withdrawal or underachievement." The evidence does not show, in fact, that the parents are the source of the emotional difficulties that the girl is experiencing. The evidence is overwhelming that the source of the girl's difficulties is the confusion she is experiencing by being pulled towards two different families: that of the natural parents and that of the foster parents. A detailed examination of the evidence presented supports this conclusion.

In the March 1985 hearing, Pam Hanson, a social worker for the Department of Human Services, testified:

A: In my opinion, I can say that after trying to attempt to talk to [the girl] about where she would like to live and again, talking with other people involved in this case, I believe [the girl] is real confused now about where she wants to be, if she wants to be with her foster parents or wants to be with the natural parents. And she's real confused, and I think this is causing her a lot of difficulties in school because I think she thinks about this a lot at school. I think either home she's in confuses her because she's not sure when—which parent to love more.

So it's my opinion at this time to keep her out of the home and keep her from going back and forth due to her age, it's going to cause too much additional trauma, that she should be placed home.

Q: In other words, it's your opinion that she should just be placed back in her parents' home; is that correct?

A. Yes, it is.

In this same hearing Abigail Sivan, a doctor who supervised an evaluation of the girl at the Child Development Center in Iowa City, testified:

First she [the girl] said she wanted to live with her foster parents, then it became clear she was very attached to her biological parents. And she would vacillate between the two. She had both of them in the waiting room kind of pulling at her.

Bonnie Boich, a social worker with the Iowa Children and Family Service reported that at one point the child drew a picture of herself standing between the two houses with arrows going in both directions and various family members crying. One of the child's teachers, Judy Nesius, testified in the June 1985 hearing that it was the changing from one house to the other that created the problems for the girl:

It seems to be that change from one to the other, you know. Once she was with the Caskeys, she did have good days. But then when the change would come, like going back to the Myers for a day, she may be just a little bear on wheels, you know. But then everything would straighten out again. It would just seem to be that transition between one house and the next.

In that same hearing Jill Cecil, a school psychologist for Great River Education agency who conducted educational evaluations of the child, testified as follows:

Q: Is it your understanding from your evaluation of the Iowa City report which you requested and in talking with the social worker and Katie, that her primary state of upset was due to the fact that she didn't know whether to choose between or didn't know where she was going to be, with the foster parents or with her natural parents, and that was the issue before the Court?

A: I don't know if—I assumed it was the issue before the Court. I think that it's the—It's a primary case of anxiety. I don't know if it's the reason for some of her behavioral manifestations in Iowa City, but it's a problem.

The conclusion, by the preponderance of the evidence, must be that the primary emotional harm being caused to the child is the traumatic changing between natural and foster parents.

The record clearly demonstrates that the parents are willing to provide assistance to their child to alleviate any emotional damage. No one disputes this. The question is only whether they are able. The guardian ad litem contends that the parents cannot provide such assistance. On the contrary, the record shows that the child will be the subject of an intensive delivery of social services when she is placed back in the natural parents' home. All of the witnesses involved in the delivery of such services to the parents and the child said that there would be a continuation of mental health counseling and a continuation of support from a variety of social work agencies. Teachers at the child's school offered to increase their working time with her.

The trial court also looked to the compliance of the parents with the agreed upon terms of the contract in deciding whether to return the child to the parental home under 232.6(b) and (f). The court concluded that the parental home was still deficient in being able to provide assistance to the girl in affairs such as

dress, study habits, social conduct, interaction with peers, and acceptable conduct. Again, the record suggests otherwise.

In an earlier hearing, Pam Hanson, a social worker, said that the parents complied with the contract and she recommended that the child be returned to the parental home. Ben Byerheim, a social worker with the Iowa Department of Social Services, while agreeing with the suggestion that the child be evaluated as an inpatient at a residential treatment center, agreed that the parents had met the terms of the contract. In the January 1986 hearing, Rhonda Doud, a protective service homemaker at Young House, testified that the parents were cooperative in their homemaking skills and were always willing to do more in any areas in which the homemaking service felt necessary. Jackie Hassel, a social worker, said she had no reservations about the child going home as long as services were continued in the home since the parents "have followed through with what is on the contract and have done what we have asked of them and have earned the right to have [the child] back home." Mary Ann Brown, appearing on behalf of the Department of Human Services and the State of Iowa, eloquently summarized the parents' compliance with the contract, the State's legal obligation after compliance has been found, and the future results of any noncompliance when she said:

Admittedly, there was abuse, physical and sexual, that occurred in this family, which would keep a family member from being in that family normally. The [parents] have gone ahead, had treatment, sought counseling to try to overcome that problem and did admit the problem existed and tried to, at least as it appears, take care of those problems. So those kinds of overt reasons for keeping the child out of the home no longer exist.

The [parents] don't have as many nice things as the [foster parents]. They aren't as educated as the [foster parents]. They aren't as worldly as the [foster parents]. The home probably isn't even as nice as the [foster parents] and the interaction among the family members might not be the same as it is in the [foster parents'] home, but

those aren't reasons we can use to keep [the child] out of the [parental] home. We can't take it upon our shoulders on our own to make a judgment what family is fit and not fit to have a child just because of their economic or academic or social backgrounds. As long as the [parents] provide for [the child], as long as they take care of her basic needs, do not deny her critical care, do not abuse her and make an effort to comply with the services and the counseling of the Department of Human Services, the State, is going to provide to them, it wouldn't appear that the State of Iowa has the right to keep [the child] away from them, because [the parents] have consistently said they want [the child] back in their home. And we have to believe them at this point in time that they are sincere in that and want to continue with the effort they have made. But I assure you, if the [parents] don't comply with that and don't continue, we'll be ready to act to take [the child] out of there if anything seriously happens to be detriment or a detriment to her safety and welfare.

Even the guardian ad litem, in the January 1986 hearing, in disagreeing with the recommendation of the State and the county attorney, said that he would be willing to have the child go home at the end of the school year and was only asking that the child be allowed to remain in the foster home until that time.

In light of the presumption that a child's best interests will be best served by leaving it with the parents and since the testimony offered by the State, by the county attorney, and by the natural parents established by a preponderance of the evidence that the child will not suffer harm in the manner specified in section 232.2(6), we have little choice but to reverse the trial court and order that the child be placed back in the natural parents' home.

In doing so, we rely on the commitment made by the panoply of state psychiatric and social service delivery systems that the child's welfare will be continually monitored and that the parental home will be closely supervised. We do not anticipate that this natural family can provide the superior home that the child has enjoyed in the foster home, but the natural family must adequately provide for the child's physical and emotional needs. We call all

parties' attention to the language in In Interest of Welcher, where we said that failure to provide for such needs may well result in consideration being given to the severance of the parent-child relationship. A decision involving a child's permanent home cannot be postponed indefinitely. In Interest of Welcher, 243 N.W.2d at 845.

REVERSED.

Hayden, J., concurs; Donielson, P.J., dissents.

I respectfully dissent. While I concur with the majority's discussion of the applicable legal principles, I simply cannot agree with the result reached in this case.

It is without question that the best interests of the child is of paramount concern. The unavoidable paradox is that, by applying the letter of the law in this case, the prospects for K.M.C. becoming a well-adjusted, productive person become extremely dim. The majority correctly points out that while there is a presumption that a child's best interests would best be served by residing with his or her natural parents, such a presumption is not conclusive, but may be rebutted by evidence to the contrary. In Interest of Welcher, 243 N.W.2d 841, 843 (Iowa 1976). I believe the evidence contained in the record sufficiently rebuts that presumption.

Much is made of the fact that T.C. and S.C., K.M.C.'s natural parents, have complied with all of the terms of the contract in which they entered in order to obtain the return of their daughter. The contract provided for a variety of areas involving hygiene, home care, nutrition, and discipline in which the C.'s were to demonstrate a minimum understanding and implementation. After two and one-half years of intensive support provided by a panoply of social services, the C.'s have barely exhibited the minimum requirements of the contract. As recently as 1986, a social worker testified that it was still necessary to instruct S.C. on the techniques of doing laundry. Nearly every one of the social workers and other witnesses who testified on behalf of returning K.M.C. to her natural parents expressed doubts as to whether the C.'s fully comply with the contract when social workers are not present in their home. Even the majority expresses doubt that returning K.M.C. to her parents' home would be successful. S.C. testified that when K.M.C. lived at their home she was

always neat, clean, and properly dressed. Yet K.M.C.'s teachers noted that at times she exhibited offensive body odor, had dirty, stringy hair, and wore clothing which was extremely ill-fitting and shabby.

Concerning K.M.C.'s psychological and educational needs, the C.'s have not demonstrated any real awareness of K.M.C.'s aggressive behavior towards other children. In fact, S.C. testified that she believed that K.M.C. had no special needs. All the persons involved in the family's rehabilitation, however, realize that K.M.C. definitely has emotional and educational needs which need to be corrected as quickly as possible. Even after countless sessions with a variety of social workers, K.M.C.'s parents, though professing an understanding of K.M.C.'s needs, actually do not realize the special needs of their daughter and most certainly could not provide the comfort and support a child of K.M.C.'s intelligence requires without heavy supervision from the state and local services.

It is undoubtedly true that the shifting between her foster and natural parents' homes has caused a great deal of stress upon K.M.C. and is likely a major contribution to her poor performance in school. In considering her best interests, however, I cannot find that the C. home at this time could be a positive influence. While the parents have undeniably attempted to correct their parenting skills, I do not believe that they have exhibited the skills necessary to provide K.M.C. a clean, healthy, positive environment in which to grow. While I do not believe that the parents should be punished because of their lack of education or financial resources, I believe that K.M.C. could better receive the assistance she needs by remaining in the foster home. I therefore would affirm the decision of the trial court.