IN THE COURT OF APPEALS OF IOWA

No. 0-699 / 99-1157
Filed January 10, 2001

FILED
JAN 10 2001
CLERK SUPREME COURT

IN THE INTEREST OF

A.S.A., Minor Child,

M.A.M., Father,
Appellant.

Appeal from the Iowa District Court for Woodbury County, Patrick H. Tott, Associate Juvenile Judge.

Father appeals from the denial of his motion for visitation with his daughter after she was placed in foster care due to her adjudication as a child in need of assistance. **AFFIRMED.**

Harold K. Widdison of Richard Rhinehart & Associates, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, and Marleen J. Loftus, Assistant County Attorney, for appellee-State.

Carol Chase, Sioux City, guardian ad litem for minor child.

Considered by Sackett, C.J., and Mahan, J., and R. Peterson, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

MAHAN, J.

Father appeals from the denial of his motion for visitation with his daughter after she was placed in foster care due to her adjudication as a child in need of assistance. He contends the denial of visitation violated his constitutional rights. He further maintains the court erred in denying his motion for appointment of a particular psychotherapist at State expense. We affirm.

Marco is the father of Ashley, born in 1990. On July 3, 1997, the State filed a petition alleging Ashley was a child in need of assistance. Following a hearing, the court found Ashley a child in need of assistance pursuant to Iowa Code sections 232.2(6)(b), (c), (d) and (n) (1997). The court placed her in the temporary care of the department of human services for relative placement. On July 23, 1999, this court affirmed the juvenile court order finding Marco had sexually abused Ashley and adjudicating her a child in need of assistance. *In the Interest of A.S.A.*, No. 98-1141 (Iowa App. July 23, 1999). Marco's application for further review was denied.

On June 16, 1999, the matter came before the juvenile court for a review/permanency hearing, and a hearing on motions for visitation and motion for psychological therapy. The court continued the permanency hearing. In an order filed June 25, 1999, the court denied the motions for visitation and psychotherapy, and ordered Ashley continue in foster care/relative placement. Marco filed a motion to correct, enlarge or amend the juvenile court order of June 16, 1999. The court denied Marco's motion. He filed notice of appeal on July 20, 1999.

In March 2000, the juvenile court denied a second motion for visitation filed by Marco. The court explained it would not be in the Ashley's best interest to resume visitations at least until after the termination hearing, scheduled for April 2000. The court stated it would treat the termination hearing as an additional hearing for visits.

On March 30, 2000, our supreme court granted Marco's motion for a limited remand to supplement the record. Both Marco and the State supplemented the record in this appeal within the allotted thirty days. On April 19, 2000, our supreme court denied Marco's motion for a stay of his appeal in this case.

On June 12, 2000, the State filed in the supreme court a motion to dismiss or, in the alternative, motion for stay of Marco's appeal. The supreme court denied the motion for stay and ordered the State's motion to dismiss be submitted with the appeal. As a preliminary matter, we have considered the State's motion to dismiss. We deny the State's motion, and will consider the merits of Marco's appeal.

Standard of Review. Our review of juvenile court proceedings is de novo. *In re K.R.*, 537 N.W.2d 774, 776 (Iowa 1995). We give weight to the fact findings of the juvenile court, especially regarding the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7); *K.R.*, 537 N.W.2d at 776. The governing concerns are the welfare and best interests of the child. Iowa R. App. P. 14(f)(15); *In re B.B.*, 500 N.W.2d 9, 11 (Iowa 1993).

Visitation. On October 27, 1998, the juvenile court ordered Marco to undergo a sexual offender evaluation and comply with the recommendations of that evaluation. Marco claims the order implied he must admit to sexually abusing Ashley before the juvenile court would allow visitation. Thus, he argues, the conditioning of visitation on his acknowledgment of sexually abusing Ashley violates his constitutional privilege against self-incrimination. Further, Marco argues the court erred in denying his request Ashley's half-sister Rosa be allowed to have visitation with Ashley.

To the extent Marco raises constitutional claims on appeal, we conclude he failed to preserve error. Issues raised on appeal for the first time are too late. *In re Robbins*, 230 N.W.2d 489, 494 (Iowa 1975). Marco failed to raise constitutional issues at the hearing prior to the June 16, 1999 order, and in his motion to correct, enlarge or amend the juvenile court's June 16, 1999 order. We will not address these issues for the first time on appeal.[1]

The best interests of the child always control the nature and extent of visitation. *In re M.B.*, 553 N.W.2d 343, 345 (Iowa App. 1996). In determining what is in the best interest of the child, the court necessarily looks at the present conditions and past performance "for that performance may be indicative of the

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[1] Marco raised the constitutional issue in his "Report to Court and Motion to Reconsider," filed with the juvenile court on August 11, 1999. At that point, however, the juvenile court no longer retained jurisdiction over the merits of this controversy. *See In re B.L.*, 470 N.W.2d 343, 347 (Iowa 1991) (only matters that are not directly involved in the appeal may be dealt with by the juvenile court during the appeal process). The juvenile court, therefore, correctly did not rule on Marco's motion to reconsider, and his claim the juvenile court erred by "ignoring" his August 11, 1999, motion to reconsider is without merit.

quality of the future care that parent is capable of providing." *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981).

The juvenile court, in its order adjudicating Ashley a child in need of assistance, found Marco had sexually abused Ashley. This court affirmed the juvenile court's findings. In its June 1999 order denying visitation, the juvenile court found Ashley continued to report physical, emotional, and sexual abuse by Marco. Ashley told the court she was afraid of her father and did not want to see him. Furthermore, the court found any significant emotional change for Ashley would not be in her best interest because of her medical condition. Her therapists recommended she have no contact with Marco. The juvenile court denied visitation with Ashley's half-sister Rosa, whom Ashley had not seen in nearly two years, because a forced visit would be traumatic for Ashley. The juvenile court denied visitation in its June 1999 order because it did not believe visitation was in the child's best interests. The juvenile court's order primarily rests on Ashley's needs and state of mind at the time, not Marco's.[2] Despite Marco's allegations to the contrary, the juvenile court did not condition visitation on an admission of sexual abuse. We affirm the juvenile court on this issue.

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[2] While a January 2000 supervised visit between Marco and Ashley apparently went well, the juvenile court denied further visitation in its March 2000 order. Again, the juvenile court considered Ashley's best interests, and determined a visit so close to the date of the termination hearing would not be in her best interests. The juvenile court agreed to consider further visitation at the time of the termination hearing. The juvenile court's denial of visitation in March 2000 is part of the record in this case, but is not at issue in this appeal. However, we agree with the juvenile court's determination.

Appointment of Psychotherapist. Marco claims the juvenile court erred in denying his motion for appointment of a specific psychotherapist at State expense. The juvenile court found:

> The Court does not disagree that psychotherapy would probably be beneficial for Marco. However, the Court does not see how it will address the underlying sexual abuse issues and its treatment. Accordingly, at this time the Court will not order funding of this therapy until such time as the primary issues are addressed.

An evaluation of Marco indicated he would benefit from psychotherapy for depression and immaturity, but would gain little from treatment specifically aimed at sexual deviation. The evaluation does not indicate Marco now admits he sexually abused his daughter or he has physically abused her. A parent must acknowledge and recognize abuse before any meaningful change can occur. *In re L.B.*, 530 N.W.2d 465, 468 (Iowa App. 1995). Further, the State indicated to the court other therapists in the area could provide services on a sliding-fee basis. Marco provided no evidence as to why these providers could not meet his needs. We affirm the juvenile court's denial of Marco's motion to appoint a specific psychotherapist at State expense.

AFFIRMED.