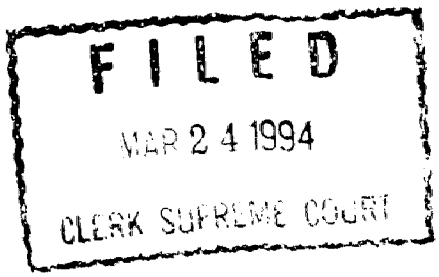
IN THE COURT OF APPEALS OF IOWA

000629

No.4-053 / 93-444



IN THE INTEREST OF S.C., A Minor Child,

P.A., Mother,

Appellant.

Appeal from the Iowa District Court for Polk County, Larry Eisenhauer and John Crouch, Judges.

P.A., the mother, appeals from a review order confirming adjudication of her daughter, S.C., as CINA pursuant to Iowa Code section 232.2(6)(c)(2) (1991), and denying return of custody. **REVERSED AND REMANDED.**

Michael D. Andrew, West Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, John M. Parmeter, Special Assistant Attorney General, and Judy Sheirbon, Assistant Attorney General, for appellee State.

J. Michael Mayer, Des Moines, for appellee father.

Cory McClure, Youth Law Center, Des Moines, guardian ad litem for minor child.

Considered by Donielson, C.J., and Habhab and Cady, JJ.

CADY, J.

P.A., the mother, and K.C., the father, are the parents of S.C. (Shawna), born June 29, 1981. The parents' marriage was dissolved in 1986. The mother was awarded custody of Shawna and the parents' other child. The mother remarried in 1987 and subsequently moved to Chicago.

Shawna, with her mother's consent, returned to Iowa to live with her father in 1991. The mother was unable to control Shawna's behavior or financially provide therapeutic treatment for her. The transfer of physical custody occurred without a formal modification of the decree, and the mother remained the legal custodian of Shawna.

Shawna was removed from the father's custody in February 1992. She had called for help after the father overdosed on medication. She was found to have a broken leg and scabies. She had not bathed in some time and had not attended school for five weeks.

A CINA petition was promptly filed, followed by an adjudicatory hearing in April 1992. At the hearing, the parents stipulated that Shawna was CINA pursuant to Iowa Code section 232.2(6)(c)(2), based on the failure of a parent to exercise a reasonable degree of care in supervising a child. The State also alleged the mother had sexually abused Shawna, but did not introduce supporting evidence. The State indicated that a separate CINA petition would be filed. The court granted an order

limiting contact between the mother and child to supervised visitations. A CINA petition based on sexual abuse allegations was filed in May 1992.

At the dispositional hearing on the original petition, the State presented a founded child abuse report against the mother. The mother requested Shawna be returned to her custody. The district court confirmed Shawna to be CINA pursuant to the original petition, ordered no contact between the mother and Shawna, and ordered continued supervised visitation with the father with a possibility of unsupervised visitation at the discretion of the Iowa Department of Human Services, "DHS." The district court made no specific adjudication that the mother was an unfit custodian. Shawna remained in the custody of DHS.

The adjudicatory hearing on the CINA petition based on the sexual abuse allegations against the mother was held in August 1992. The court found the evidence insufficient to support the allegations and dismissed the petition. The order on the original petition was modified to cancel the no-contact order.

A review hearing was held in January 1993. The State urged that Shawna remain in foster care with the goal of returning her to the father's custody. The mother again requested Shawna be returned to her custody. She moved to dismiss the adjudication because of the absence of any finding that she was unfit to regain custody. The district court found the mother had voluntarily turned physical

custody of Shawna over to the father, had not contacted Shawna since August 1992, and had not demonstrated a willingness and ability to regain custody of Shawna. Continued foster care was ordered.

The mother appeals. She contends she has never been adjudicated unfit and there was no statutory or factual basis for refusing to return Shawna to her custody. She claims the district court unconstitutionally interfered with her parental rights.

The State argues the mother's failure to appeal the August 1992 order continuing Shawna's foster care placement and setting a review in six months constitutes an admission that adjudicatory grounds exist to prevent returning Shawna to her care. The father joins in the argument.

I.

The district court transferred custody of the child to the department following an adjudication of CINA based solely on the unfitness of one of the child's custodial parents. This was impermissible. When two parents maintain custodial rights of a child, the law does not permit custody to be transferred to the department at a dispositional or review hearing unless the court has made a CINA-based adjudication by clear and convincing evidence that the child has suffered or is imminently likely to suffer harm from acts or omissions of both parents. In re J.R.H., 358 N.W.2d 311, 320-21 (Iowa 1984); Iowa Code § 232.102(5) (1993).

The CINA adjudication is not necessarily required to be made at the initial adjudicatory hearing, and may be tried by consent of the parties at any stage of the proceedings. In re J.R.H., 358 N.W.2d at 321; Iowa Code § 232.93 (1993). The pleadings may also be amended during the course of the proceedings to expand a CINA determination. In re J.R.H., 358 N.W.2d at 321. The critical factor, in each instance, is that the court make the proper determination prior to a transfer of custody.

We are not unmindful of the paramount goal in juvenile cases to protect the welfare of children. See In re B.B., 440 N.W.2d 594 (Iowa 1989). The purpose of the dispositional phase of the CINA proceedings, however, is to keep custody of children with a parent whenever possible. In re J.R.H., 358 N.W.2d at 320. Since the record is void of any CINA finding based on the acts or omissions of the mother, we must reverse. The allegations against the mother presented at the various hearings in this case were insufficient, without a specific adjudication, to deny her custody. Moreover, the mother's failure to appeal the earlier dispositional order denying her custody cannot be construed as a judicial admission of her unfitness or a waiver of the requirement of a CINA adjudication.

We believe this case should be remanded for further review hearing. Unless the mother is determined to be an unfit parent pursuant to Iowa Code section 232.102(5) (1993), after proper notice of any amendments to the

pleadings, and the father continues to be an inappropriate placement option, the court shall transfer custody of the child to the mother.

Because the case is resolved on statutory grounds, we refrain from answering the constitutional claim asserted by the mother. See In re Chad, 318 N.W.2d 213 (Iowa 1982).

REVERSED AND REMANDED.