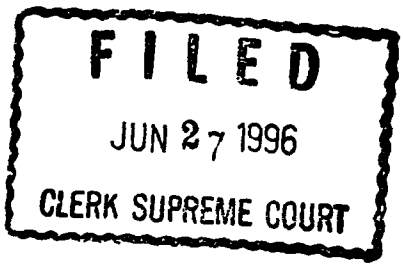
**IN THE COURT OF APPEALS OF IOWA**

No. 6-342 / 95-1614




**IN THE INTEREST OF Me.G. and A.G., Minor Children,**

**M.G., Mother,**
Appellant.

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Appeal from the Iowa District Court for Johnson County, Sylvia A. Lewis, Associate District Judge.

M.G. challenges the modification order placing her children Me.G. and A.G. in the custody of the Department of Human services for placement in foster care.

**AFFIRMED.**

Sally Weyer of Bergan & Weyer, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Diane M. Stahle, Special Assistant Attorney General, Maureen McGuire, Assistant Attorney General, and Deborah F. Minot, Assistant County Attorney, for appellee State.

Mark C. Meyer of Kinnamon, Kinnamon, Russo & Meyer, Cedar Rapids, guardian ad litem for minor children.

Heard by Sackett, C.J., and Habhab and Streit, JJ.

**STREIT, J.**

Appellant M.G. is developmentally delayed and has an I.Q. of 68. She has four children. M.G.'s rights were terminated on her oldest child, and another lives with his paternal grandmother. Two other children, Me.G. and A.G., are the subject of this appeal.

Me.G. suffered a stroke before or during birth in September 1993. As a result, Me.G. has a seizure disorder and neurological problems that require special medical care. In June 1994, the State filed a child in need of assistance petition alleging (1) M.G. was unable to provide for Me.G.'s special medical needs, (2) M.G. had difficulty providing suitable housing, and (3) M.G. used inappropriate caretakers. In addition, there were concerns from service providers that M.G. was unable to meet Me.G.'s developmental needs, provide nutritious meals, and lacked the ability to budget her money in order to meet her family's needs. Me.G. was adjudicated a child in need of assistance in September 1994. In October 1994, a dispositional order was issued whereby M.G. retained custody of Me.G. and the Department of Human Services was to provide protective supervision.

A.G. was born in October 1994. The State filed a child in need of assistance petition in November 1994 alleging (1) M.G. had not obtained housing as she was ordered to do, (2) she failed to have adequate supplies for A.G. when he was born, and (3) a denial of critical care report was founded when the mother left the children with a caretaker without instructions on how to properly use the apnea monitor for

A.G. In March 1995, A.G. was adjudicated to be a child in need of assistance. At the dispositional hearing, the court ordered both children to remain in the mother's custody, despite recommendations for placement by the Department of Human Services, so long as several conditions set forth by the court were followed by M.G. The purpose of the conditions were to protect the children by restricting M.G.'s choices, thereby lessening the chaos in their lives and adding structure to ensure their physical, developmental, and emotional needs were being met.

In July 1995, the State requested a modification hearing regarding the placement of the children. At the modification hearing in August 1995 it was shown that M.G. violated several conditions set forth in the March 1995 dispositional order by allowing unapproved overnight guests, refusing to cooperate with a protective payee, and allowing smoking in her apartment. A denial of critical care and lack of proper supervision allegation was investigated and founded by the Department of Human Services. The court ordered the children into foster care because they were not safe in M.G.'s custody.

M.G. appeals the decision placing the children in foster care asserting: (1) the court did not have authority under Iowa Code section 232.102 to place the children in foster care; (2) there was no material and substantial change of circumstances to warrant modification of the order; and (3) there was no clear and convincing evidence of reasonable efforts to keep the children in M.G.'s custody.

The standard of review for juvenile court proceedings is de novo. *In re Blackledge*, 304 N.W.2d 209, 210 (Iowa 1981). The reviewing court is not bound by the findings of the juvenile court, but may give weight to the trial court's findings as the court is in the best position to determine the credibility of witnesses. *In re R..F.*, 471 N.W.2d 821, 824 (Iowa, 1991) (citing Iowa R. App. P. 14(f)(7)).

M.G. contends the court lacked authority under Iowa Code section 232.102 to place the children into foster care. Iowa Code § 232.102 (1995). M.G. argues that section 232.102 applies only to dispositional review hearings or, in the alternative if section 232.102 does apply to modification hearings, the options available under section 232.102(8) do not provide for change in custody. We hold that the court does have authority under section 232.102 to change custody.

The August 1995 hearing was a modification hearing pursuant to section 232.103. Section 232.103 requires an appropriate person request modification and proper notice of the hearing be given. The State filed an appropriate application to modify. The mother and her attorney were on notice as to the purpose of the hearing and no objections were made.

Furthermore, under section 232.103(6), if the court vacates the order, "[i]t may make any other order in accordance with and subject to the provisions of . . . section 232.102". Iowa Code § 232.103 (1995).

Juvenile court has the authority to transfer custody after a dispositional hearing or modification proceedings subject to the constraints of section 232.102. *In re*

*Blackledge*, 304 N.W.2d 209, 214 (Iowa 1981). Therefore, during a modification hearing a court may, under section 232.103 and in conjunction with section 232.102, order a change in custody if a material and substantial change in circumstances exists. Although the court cited only section 232.102, it is excusable error and under de novo review the result may be affirmed.

M.G. further argues there was no material and substantial change in circumstances to warrant modification of the order. M.G.'s difficulty in determining appropriate caretakers for her children resulted in several founded child abuse reports for denial of critical care. In the March 1995 order, the court set forth six conditions M.G. was to follow in order to keep the children in her custody. The primary purpose of the conditions was to set limits for the mother because of her intellectual limitations. The judge specifically stated if the conditions were not met by, or were not acceptable to M.G., the children would be placed in foster care.

From March 1995 to July 1995, M.G. violated several of the conditions ordered by the court. She used inappropriate and at times dangerous caretakers for the children. Non-approved individuals continued to be overnight guests. Smoking was permitted in the home where A.G. was not to be exposed to smoke due to his health problems. M.G. refused to cooperate with a protective payee to ensure the financial needs of her family could be met. Another child abuse report was founded when M.G. left A.G. in the care of her aunt who had her own parental rights terminated due to physical abuse, which included breaking the leg of her three-year-

old child. M.G. knew her aunt was an inappropriate caretaker, but allowed her to care for her child, placing A.G. in great risk of physical harm.

Although there was no actual physical harm to the children during this period of time, we recognize the pattern of risk these children face is great. The welfare and best interest of the child are the most important considerations. *In re N.M.W.*, 461 N.W.2d 478, 480 (Iowa App. 1990). Although M.G. can provide food, clothing, and shelter for the children, the special needs of Me.G. and A.G. require more than just the basics. When M.G. violated the conditions in the March 1995 court order, material and substantial change in circumstances existed, warranting action by the court to ensure the children's safety.

There was clear and convincing evidence of reasonable efforts to keep the children in M.G.'s care. Multiple services were offered to M.G. and the record shows she has either exhausted many of the services available to her or has been resistant to services offered, as evidenced in the August 1995 modification hearing. The placement of the children in foster care will protect the children from chaos and abuse and will allow M.G. the opportunity to decide whether or not she will take further steps to shield the children from risk of harm and can have the children returned to her custody.

We affirm the decision of the juvenile court.

**AFFIRMED.**

Habhab, J., concurs; Sackett, C.J., dissents.

**SACKETT, C.J.** (dissenting)

I dissent. The question is whether the two children of Marian, a mother who is developmentally challenged, should have been removed from her custody and placed in foster care. Marian loves her children and they love her. The juvenile court found Marian loving and capable of meeting the children's basic nutritional and medical needs. The children were in good health and there was no evidence of any physical or sexual abuse. The placement was ordered because the trial court found Marian too generous and tolerant of others and not reliable in making protective decisions concerning the children. The court further found Marian's decision to frequently have overnight guests was not conducive to the best interests of the children.

The testimony from service providers was that there were not further services available to assist Marian in caring for her children. It appears, therefore, that this removal is a prelude to the filing of a termination of parental rights action.

This case presents difficult issues because we must balance the constitutional rights of Marian to her children and her children's right to be adequately protected and cared for while they grow to adulthood. Marian has, to the best of her ability, provided good care for her children. Her choice of persons she associates with and her generosity with them are decisions she has made that a person with greater mental abilities may have made differently.

Parenting is not an exact science. All parents at times make decisions that are not in their children's best interests and merely being intelligent does not make one a good parent. Because of Marian's developmental deficiencies, she has been under more careful scrutiny than most parents are placed under. We also are, to a certain extent, assessing her parenting ability by stereotyped middle-class value judgments. The fact there may be better parents is not the standard by which we judge this case. If we use such a standard, as one commentator suggested, only the most worthy in our society will be given the opportunity.

Furthermore, placing children in State care does not guarantee good parenting. Children suffer when removed from their parents' care. State care frequently means a number of different placements and the loss of the child's ability to bond.

Marian has limitations, but she has been a consistent and loving caretaker for her children. Consistent loving caretakers are important to children becoming emotionally stable adults.

Because of Marian's mental handicap, if she is to care for her children, she will always need assistance. With additional supervision and money management help, she can be an adequate parent. I do not find that the record supports a finding the children should have been removed from Marian's care.