

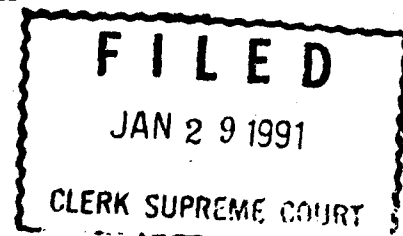
IN THE COURT OF APPEALS OF IOWA

No. 0-670 / 90-679

IN THE INTEREST OF B.L., A Child.

H.L., Natural Mother,

Appellant.



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

Mother appeals son's placement in his father's home
following CINA adjudication. **REVERSED AND REMANDED.**

Hilary Strayer, Iowa City, for appellant mother.

Bonnie J. Campbell, Attorney General, Gordon E. Allen,
Deputy Attorney General, and Kathrine S. Miller-Todd,
Assistant Attorney General, for appellee State.

Emmit J. George, Iowa City, for appellee father.

Heard by Oxberger, C.J., and Schlegel, and Hayden, JJ.,
but decided en banc.

OXBERGER, C.J.

B.L. is a boy born in April 1982. His parents have never been married to each other. He also has an older sister who has a different father.

The boy lived with his mother, H.L., until 1989. In January of that year the child, after displaying uncontrolled aggressive behavior, was adjudicated to be a child in need of assistance under Iowa Code section 232.2(6)(f). Section 232.2(6)(f) defines a child in need of assistance to include a child "[w]ho 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 boy remained in his mother's home subject to Department of Human Services (DHS) supervision following the CINA adjudication for the remainder of the school year. In June 1989 the juvenile court transferred the boy's placement to the home of D.B., his natural father. The boy remains in his father's home, subject to supervision. Social workers testified at a six-month review hearing that the boy's behavior patterns have improved since transfer to his father's home.

In March 1990, following a review hearing, the juvenile court confirmed the boy's placement in his father's home. Mother appealed the juvenile court order.

Mother challenges the sufficiency of the evidence to support the boy's continued placement with his father. She contends the State failed to prove the boy would suffer harm if returned to her home and argues D.B. is a poor custodian due to his criminal history, former alcoholism, and unstable employment.

Moreover, Mother contends the boy's continued placement with his father denies her substantive due process because of the insufficiency of the evidence to support placement outside her home.

Mother also asserts the boy's placement with his father violates an earlier court order in a paternity and child support action. The previous order did not expressly place the boy in Mother's sole custody, but she argues the previous order obviously contemplated that she was the boy's sole custodian and therefore in essence constituted a custodial order. Mother urges Iowa Code section 675.40 establishes her as the boy's sole custodian. Section 675.40 provides in part: "The mother of a child born out of wedlock whose paternity has not been acknowledged and who has not been adopted has sole custody of the child unless the court orders otherwise."

Mother argues the juvenile court erred by treating the boy's placement with his father as a disposition under Iowa Code section 232.101 (retention of custody by parent) instead of under section 232.102 (transfer of legal custody and placement).

The attorney for the child filed a brief agreeing with some of Mother's positions and arguing the evidence supports returning the boy to Mother's home. In the alternative, the attorney for the child argues that even if the boy remains in his father's home temporarily, Iowa Code section 232.102 requires DHS to make efforts to return the boy to Mother's home from which he was originally removed.

Both the father and the State filed briefs supporting the juvenile court's order.

We review orders entered following a CINA review hearing de novo. In re Interest of Blackledge, 304 N.W.2d 209, 210 (Iowa 1981). The welfare and interest of the boy are our paramount concern. In re interest of J.R.H., 358 N.W.2d 311, 317 (Iowa 1984)(citation omitted).

We see the main issue of this appeal to be whether the juvenile court correctly determined the boy's placement was pursuant to Iowa Code section 232.101(1) which states in part:

After the dispositional hearing, the court may enter an order permitting the child's parent, guardian or custodian at the time of the filing of the petition to retain custody of the child subject to terms and conditions which the court prescribes to assure the proper care and protection of the child.

Mother asserts the boy's placement should have been pursuant to Iowa Code section 232.102(1)(a):

After a dispositional hearing the court may enter an order transferring the legal custody of the child to one of the following for purposes of placement:

(a) A relative or other suitable person.

Mother then argues that if the boy's placement is pursuant to section 232.102(1)(a) the court must return the boy to her home upon a finding by clear and convincing evidence that the boy will not suffer some harm justifying a CINA adjudication. Mother cites Iowa Code 232.102(7) and In re Blackledge, 304 N.W.2d 209, 214 (Iowa 1981), as supporting her argument. We agree.

The juvenile court found this case similar to the situation in In re J.R.H., 358 N.W.2d 311 (Iowa 1981), in that the boy is a child born out of wedlock whose paternity has been acknowledged. In J.H.R., the court determined that where paternity of a child born out of wedlock has been acknowledged, both parents are entitled to legal custody before the initiation of CINA proceedings. Id. at 319.

We find this case distinguishable from J.R.H., because in J.R.H., the mother left the child in the care of the unwed father when the couple separated. In this case, the boy's father never had physical custody until the CINA proceeding. In the absence of legal proceedings declaring an unwed father's physical custody right or mutual

acknowledgment by parents of the father's physical custody or care rights an unwed mother's statutorily mandated right to sole physical custody remains intact. Granted, an acknowledged unwed father has legal custody rights, but those rights do not include the right to physical custody of the child without approval by the court or the mother.

Public policy requires orderly division of physical care rights of unwed children. Our legislature recognizes that at birth, the custody of a child born to an unwed mother is solely with the mother. This includes both the legal and physical custody of the child. To prevent unwed parents from later tearing the child apart, an orderly procedure is needed to transfer that original physical custody to the father.

Accordingly, we remand this case to the trial court to conduct a hearing pursuant to Iowa Code section 232.102(7) to determine if the boy can be returned to his mother's home. If the boy cannot be safely returned to his mother's home at the time of the hearing, then a determination must be made about what additional services are necessary to facilitate the boy's eventual return.

We encourage the parties to this appeal to proceed under Iowa Code section 232.3 to request concurrent jurisdiction in order that the District Court may make more permanent resolutions of the custody, visitation, and support of the boy.

We need not address Mother's other arguments in light of this opinion.

REVERSED AND REMANDED.

Donielson, Schlegel, and Hayden, JJ., concur; Sackett and Habhab, JJ., dissent.

SACKETT, J. (dissenting)

I dissent. I would affirm the trial court.

The majority has determined an unwed father is not a parent under Iowa Code section 232.101. They have determined section 675.40 mandates the mother was her son's sole custodian even though there never had been an order placing the child in her custody. The majority's decision fails to properly define parent. In In re J.H.R., 358 N.W.2d 311, 319 (Iowa 1984), the Iowa court said:

The term "parent" as used in chapter 232 includes "a natural or adoptive mother or father of a child but does not include a mother or father whose parental rights have been terminated." Iowa Code § 232.2(34) (1983). The fact that the mother did not have physical custody of the children prior to these proceedings did not affect her status as a parent or her legal right to custody in the absence of an adjudication.

Id. See Heyer v. Peterson, 307 N.W.2d 1, 6 (Iowa 1981).

A child in need of assistance is frequently in need of help from both his or her natural parents. There is no basis to create barriers for a natural father who has the resources and is willing to help the child. There is no basis to assess a father's ability to help his child solely on his marital status when the child was conceived and/or born. The juvenile court was correct in considering both father and mother as this child's parents.

Habhab, J., joins this dissent.