

FILED

JAN 29 1986

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN THE INTEREST OF S.R., JR.,

A Child,

J.A.R.,

Appellant.

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Filed January 29, 1986

5-564
85-539

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Appeal from the Iowa District Court for Linn County - Lynne E. Brady,
Judge.

The mother appeals the dispositional order in a CHINA proceeding changing
legal custody of her child from her to the Department of Human Services.
REVERSED AND REMANDED.

Susan E. Harman of Lynch, Dallas, Smith & Harman, Cedar Rapids, for
appellant.

Thomas J. Miller, Attorney General; Charles K. Phillips, Assistant Attorney
General; and Gregory Epping, Assistant County Attorney, for appellee State.

Michael Newmeister, Cedar Rapids, guardian ad litem for the child.

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

The mother appeals the dispositional order in a CHINA proceeding changing legal custody of her child from her to the Department of Human Services. The mother contends the juvenile court erred in that there was not clear and convincing evidence the child would suffer harm within the meaning of Iowa Code section 232.2(5) (1985) if allowed to remain in his mother's custody.

In this case, the mother, J.A.R., obtained custody of her young son, S.R., Jr., following the dissolution of her marriage to the boy's father. She lived with the boy and took care of him for three years, until she found employment with a traveling carnival. In 1983, the boy traveled with his mother and the carnival during his summer vacation for one and a half months. At that time, believing it to be in her son's best interests, J.A.R. left him in the custody of his paternal grandmother.

The carnival abruptly terminated J.A.R.'s employment while she was in Alabama. J.A.R. remained in Alabama with her fiance and intended to save enough money to return to Iowa and pick up the child. Unbeknownst to the mother, the father returned to the grandmother's house and abused the child. The Department of Human Services took emergency custody of the child following a physical assault by the father on the child in June of 1984.

In July of 1984, the State filed a child in need of assistance petition based on the abuse. After the adjudicatory hearing which was attended by the child's attorney, the mother's attorney, and the father's attorney, the child was found to be in need of assistance on August 8, 1984, by the juvenile court referee. The Department of Human Services was awarded temporary custody to place the child in foster care and the referee ordered a home study to be prepared of the mother's residence in Alabama. The father's attorney indicated the father had "little interest in this matter."

The dispositional hearing was held on October 29, 1984. J.A.R. and her fiancée were present along with the parties' respective attorneys. The State recommended the child be allowed to return to Alabama with the mother. The recommendation was not resisted. Evidence showed the mother was living with her fiancée and their child in a two-bedroom trailer near the fiancée's parents' home. The fiancée was employed full-time as a foreman. The Alabama home study was not available at this time, but a social history prepared by the Iowa Department of Social Services was considered. The referee ordered custody be transferred from the mother to the Department of Human Services for foster care placement. On November 2, 1984, the mother filed for rehearing.

An Iowa case progress report was filed on January 22, 1985, and indicated that the mother had been in weekly contact with her son who was doing well in foster care.

At the rehearing on March 7, 1985, the juvenile court considered the mother's compliance with the case permanency plan filed on November 26, 1984, and the positive results of the Alabama home study which was received on February 6, 1985. Nonetheless, the juvenile judge affirmed the referee's dispositional order in that custody was granted to the Department of Human Services until the end of S.R., Jr.'s school year. Thereafter, a trial home placement with the child's mother in Alabama was ordered.

The mother contends on appeal that chapter 232 requires the least restrictive alternative in placement and permits the child to remain at home whenever possible. She claims section 232.102 prohibits the transfer of legal custody unless a specific finding is made that the parent is unfit and the child cannot be protected from harm otherwise. She contends there was no specific finding by clear and convincing evidence of what harm, if any, would befall the child in this case from her having custody.

After the parties' briefs were filed in August of 1985, a second Iowa case progress report was filed on October 28, 1985. This report indicated that S.R., Jr. had been living with his mother since May 31, 1985, and that the mother and child were attending weekly counseling sessions, but they did not attend the last three scheduled sessions due to a lack of transportation. The mother apparently desires in-home counseling if possible. S.R., Jr. also attended an Alabama school and received good grades. The mother's fiancé and S.R., Jr. have had disagreements regarding each other's attitude. The Iowa report recommended that the prior order continue until a further progress report was received from the Alabama authorities.

I.

In an appeal from a dispositional hearing, we review the evidence de novo. In re Interest of Blackledge, 304 N.W.2d 209, 210 (Iowa 1981) (citing In re Interest of Welcher, 243 N.W.2d 841, 843 (Iowa 1976)). Iowa Code section 232.99 (1985) provides that after a dispositional hearing "the court shall make the least restrictive disposition appropriate considering all the circumstances of the case." This section also provides the court with three possible dispositions for the child: to conditionally suspend judgment for twelve months under section 232.100; to enter an order conditionally permitting the child's parent at the time the petition was filed to retain custody under section 232.101; or to transfer legal custody to one of the alternative placements enumerated under section 232.102. In re Interest of J.R.H., 358 N.W.2d 311, 319 (Iowa 1984).

Chapter 232 explicitly states a policy preference for keeping children in their own home. Iowa Code § 232.1 (1985). See also J.R.H., 358 N.W.2d at 320. This preference, coupled with the least restrictive disposition requirement of § 232.99, leaves us to conclude S.R., Jr.'s mother should have retained custody. The dispositional court did not indicate that § 232.101 was even considered

as an alternative. The record before us indicates that J.A.R. lives with her fiancé and their infant daughter and has established a stable environment for S.R., Jr. in Alabama. J.A.R.'s fiancé is gainfully employed, and the family lives nearby his parents so that they can readily lend their support if needed. J.A.R. has shown a keen desire to have custody of her son and has adequately met the requirements listed in the Iowa case permanency plan along with receiving a positive review from the Alabama authorities.

The concerns of the State regarding J.A.R.'s rearing of S.R., Jr. in the past are well taken. Those concerns, however, pale in comparison to the home environment J.A.R. can presently provide for her son and her strong desire to have custody of her son.

II.

Even if retention of custody by J.A.R. had not been warranted, the transfer to the Department of Human Services pursuant to § 232.102 was deficient.

The referee's decision was made under Iowa Code § 232.102(3) (1983), which provided, in relevant part:

Whenever possible the court should permit the child to remain at home with his or her parent, guardian or custodian. Custody of the child should not be transferred unless the court finds there is clear and convincing evidence that:

a. The child cannot be protected from physical abuse without transfer of custody; or

b. The child cannot be protected from some harm which would justify the adjudication of the child as a child in need of assistance and an adequate placement is available.

In 1984, § 232.102(3)(b) (1983) was amended by Acts 1984 (70 G.A.) Ch. 1279, § 16, and contains a new unnumbered paragraph. Amended § 232.102(3)(b) provides:

The child cannot be protected from some harm which would justify the adjudication of the child as a

child in need of assistance and an adequate placement is available.

The order shall, in addition, contain a statement that removal from the home is the result of a determination that continuation therein would be contrary to the welfare of the child, and that reasonable efforts have been made to prevent or eliminate the need for removal of the child from the child's home.

Under Iowa Code § 3.7 (1983), this change in the law became effective on July 1, 1984, which means the new provisions applied at the time of the referee's dispositional hearing on October 29, 1984.

J.A.R. correctly points out that no statement was contained along with the order pursuant to Iowa Code § 232.102(3)(b) (1985). The referee used the 1983 version of § 232.102(3)(b) and found "the child cannot be protected from harm within the meaning of [§] 232.2(5) (which is presently § 232.2(6)) without transferring custody to the Department of Human Services for foster care placement." Because no statement was provided in the order pursuant to the unnumbered paragraph of § 232.102(3)(b) (1985), the referee's order was deficient.

In addition to failing to make the requisite statement in the order under § 232.102(3)(b) 1985), the referee did not make a finding that the mother was an unfit custodian for her child during the dispositional stage before a transfer of legal custody can occur pursuant to § 232.102. In the Interest of J.R.H., 358 N.W.2d at 319.

The State maintains J.R.H. is distinguishable because in that case the abuse was not attributable to the nonabusive parent; whereas, the nonabusive parent in this case did precipitate the abuse of S.R., Jr. This is not a meaningful distinction. J.A.R. did not directly cause S.R., Jr. to be abused; she merely left her son with his paternal grandparent so that her son could have a stable environment while she traveled as her job required. J.A.R. should not be held accountable for the unlikely act that S.R., Jr.'s father would return and abuse

his son. Moreover, the nonabusive parent in J.R.H. left her children with their father who was known to have a long-standing drinking problem. The judgment of the mother in leaving her children with their father in J.R.H. appears to be more suspect than the judgment exhibited by J.A.R. in this situation.

The other reasons raised by the State to lend support to the referee's order are not particularly persuasive. J.A.R. is not presently engaged in a transient life-style nor was her prior incident involving the Department of Human Services particularly troublesome. While J.A.R. would take S.R., Jr. from Iowa if she is awarded custody, she would do so because her home is in Alabama and not for some improper motive as the State intimates.

Albeit S.R., Jr. had learning disabilities and has experienced difficulties in becoming completely integrated in J.A.R.'s household. Nevertheless, S.R., Jr.'s progress at the Alabama school is satisfactory and the disputes between S.R., Jr. and J.A.R.'s fiancée are not atypical given the circumstances. S.R., Jr.'s fear of abandonment and lack of stability are being adequately addressed.

Our review indicates that the referee did not make the appropriate findings under Iowa law and J.A.R.'s life-style is conducive to raising a child so that given the parental preference embodied in chapter 232, the dispositional order must be set aside. Unless the pending Alabama progress report indicates conditions have gotten worse and a proper hearing is made to address these issues under § 232.102, the child shall be placed in J.A.R.'s custody subject to any terms, conditions, and time extensions prescribed by the juvenile court under § 232.101. We reverse and remand to the trial court so that the Alabama report requested by the Iowa authorities can be evaluated. The trial court's disposition of this matter shall be consistent with this opinion.

REVERSED AND REMANDED.