FILED
SEP 6 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN THE INTEREST OF B. H., A Child)
) Filed September 6, 1984
B. T., Natural Mother,)
) 4-254
Appellant.) 83-1266
)

Appeal from the Iowa District Court (Juvenile Division) for Clinton County—Arlen J. VanZee, Judge.

Petitioner appeals juvenile court order refusing to increase visitation or return petitioner's child to her after child was removed in CHINA proceeding. APPEAL DISMISSED.

Robert J. McGee of Holleran, Shaw, Murphy & Stoutner, Clinton, for the appellant-mother.

Stephen D. Haufe of Jurgemeyer, Frey & Haufe, Clinton, guardian ad litem (appellee).

Thomas J. Miller, Attorney General, and Brent D. Hege, Assistant Attorney General, for the appellee-State.

Considered by Oxberger, C.J., Donielson, and Schlegel, JJ.

OXBERGER, C.J.

The petitioner's daughter in this case was removed from the mother's home after being adjudicated a child in need of assistance, and petitioner appeals from the juvenile court's decisions regarding visitation and placement made in its six-month review hearing. Respondent claims the juvenile court decisions were not final for the purpose of appeal and that interlocutory appeal should not be granted. We agree and dismiss the appeal.

The court's involvement in this case began in February 1981 when petition was filed stating the petitioner's daughter, B. H., was a child in need of assistance. Petitioner consented to the CHINA petition, and B. H. was removed from her mother's home. Various legal action has followed, but we will review only that pertinent to this appeal. B. H. was returned to her mother in May 1981, was removed again in January 1983, and legal custody was placed with the Iowa Department of Social Services. The child was placed in foster care, where she remains. The case plan ordered implemented by the court allowed petitioner to visit her daugher once every two weeks for an hour. Visitation was to be increased at the discretion of the Iowa Department of Social Services and juvenile court. It was increased to one hour per week in a court order entered February 15, 1983. Petitioner applied to increase visitation and to have the child returned to her. A six-month review hearing was held pursuant to Iowa Code section 232.102(6)(1983). The juvenile court found in its order of September 28, 1983, lack of improvement in parenting skills of the petitioner, indications of stress in the child after her mother's visits, and petitioner's failure to accept some services offered her to improve her skills. The court decided there would be no changes in visitation and the child would remain in the custody of the Department of Social Services for placement in foster care. Petitioner filed this appeal, stating that the juvenile court erred in deciding not to return the child to her or increase visitation. She further claims that if the child was not to be returned to

her, services and counseling should have been ordered by the court for her and the child to solve the problems so that the child could eventually be returned to her.

Respondent counters the appeal should be dismissed because the juvenile court decision was not final, and that interlocutory appeal is not warranted.

I. Finality of the Decision

The appellate courts do not have jurisdiction if a ruling is not a final judgment, except when leave of court is granted for appeal. Stearns v. Kean, 303 N.W.2d 408 (Iowa 1981). It is not sufficient to confer jurisdiction if the decision might become final at some future time. Decatur-Moline Corp. v. Blink, 283 N.W.2d 347 (Iowa 1979). The Iowa Courts have indicated that, generally, decisions, opinions, findings, or verdicts form a basis for which a judgment or decree is entered, but are not in themselves final for the purposes of appeal. Crowe v. DeSoto Consolidated School District, 246 Iowa 38, 40, 66 N.W.2d 859, 860 (1954). The court explains:

> A final judgment or decision is one that finally adjudicates the rights of the parties, and it must put it beyond the power of the court which made it to place the parties in their original positions. It is a determination which may be enforced by execution or in some similar manner.

Id. (citing In re Estate of Swanson, 239 Iowa 294, 305, 31 N.W.2d 385, 391 (1948)). It appears, therefore, a decision involving temporary placement or custody of a child which could be changed to place the parties in their original position would not be final for appeal purposes, under this analysis. An award or permanent change of custody would be final, since the parties could not be returned to their original positions until one party again sought the court's jurisdiction.

The Iowa courts have not specifically addressed the question whether a decision at a six-month review pursuant to Iowa Code section 232.102(6) is reviewable. However, other jurisdictions appear to have adopted this view that

continuation of placement involves a ruling by the court which is not final. Awarding permanent custody, the courts have clarified, is appealable, even though the parties may return to the court to change custody. Dietrich v. Anderson, 43 A.2d 186, 185 Md. 103 (1945). Where no award of custody is made, however, or custody is awarded temporarily, the decision is not final. E.g., McKenzie v. McKenzie, 225 Ga. 314, 168 S.E.2d 152 (1969)(refusing to allow review of temporary custody order since not final); Petition of Morehead, 64 Ill. App. 2d 469, 212 N.E.2d 250 (1965)(refusing review where court merely affirmed prior temporary custody order); Stonebrink v. Stonebrink, 2 Or. App. 328, 468 P.2d 546 (1970)(refusing review of order of temporary custody since not final).

Although finality was not in issue, cases where the Iowa Supreme court has reviewed a custody decision show a permanent award of custody has been involved. The court in one case reviewed a decision of the lower court which appeared to be an action involving placement under section 232.102(6) of the code. In re Interest of Blackledge, 304 N.W.2d 209 (Iowa 1981). The court decided, however, the action was not one involving temporary placement, but involved an award of custody to the children's father. Id. at 212-13. This distinction was discussed in another case which noted that Blackledge involved modification of a decree and award of custody. In the Interest of Leehey, 317 N.W.2d 513 (Iowa Ct. App. 1982). In Leehey the court was also faced with a decision which appeared to fall under section 232.102(6). Id. The court noted there are three options available to the court under section 102(6); (1) to return the child to her home, (2) extend placement, or (3) commence termination proceedings. Id. at 515. As noted in Blackledge, "A new transfer of legal custody is not among the alternatives." In Interest of Blackledge, 304 N.W.2d at 213. The court in Leehey

decided that since the lower court had gone beyond the available options of section 232.102(6) and taken custody from the Department of Social Services, giving custody to the father, the action was actually a modification under section 232.103, despite the label given to it. In Interest of Leehey, 317 N.W.2d at 515. Therefore, the court will look to the action taken by the court to decide if it is mere continuation of placement, or involves a modification of custody.

We agree that a continuing order of placement is normally not final for appeal and we hold that, absent extenuating circumstances, if the action is within the confines of section 232.102(6), as opposed to modification under section 232.103, it is not final. In so doing, we will also look to the substance of the action rather than its label, as the court did in Blackledge and Leehey, to decide if the order involves continuing placement or a modification.

In the present case, the pleadings and court order refer to section 232.102(6) as the applicable code section. In addition, the court limited itself to the actions available under the code provision, and did not exceed its prerogatives. No award or change of custody was made. Instead, the court continued placement of the child with the Department of Social Services. Since the court did not attempt to modify custody and acted within the provisions of section 232.102(6), the court could later place the parties in the original position by returning the child to her mother. The placement decision, therefore, was not final.

The same considerations apply in deciding if the court's refusal to expand visitation is final, and indicate that it, too, is not final. The Texas court has agreed with this result in Gani v. Gani, 475 S.W. 2d 810 (Tex. Civ. App. 1972). There, temporary visitation was granted to the father and the visitation was to occur under the control and supervision of the court. Id. at 811. A later hearing was set to make the final determination regarding visitation. Id. The court held the order was not final and dismissed appeal of the visitation order. Id. The court

noted, "The record reflects that the trial court was testing the good faith actions and behavior of the visiting father, appellant, before making a final decree relative to visitation privileges." Id. In this case, as in Gani, the juvenile court has approved a temporary decision regarding the visitation allowed petitioner so that her ability to parent may be tested, and a final determination made later. As in the Gani decision, we hold that the visitation decision of the juvenile court was not final for appeal.

II. Interlocutory Appeal

Petitioner claims in the alternative that if the order is not final, interlocutory appeal should be granted.

Iowa Rule of Appellate Procedure 2 outlines what must be shown to grant an interlocutory appeal. If the court decides the decision involves substantial rights, that it will materially affect the final decision, and that to decide the question now will better serve the interests of justice, it may grant appeal. Iowa R. App. P. 2(a). The standard was further outlined when the court stated, "The test by which the right of appeal from an intermediate order is to be determined is: Will the party aggrieved thereby be deprived of some right which cannot be protected by an appeal from the final judgment?" Dorman v. Credit Reference & Reporting Co., 213 Iowa 1016, 1019, 241 N.W. 436, 438 (1932)(citations omitted); Wolf v. Lutheran Mutual Life Insurance Co., 236 Iowa 334, 18 N.W.2d 804 (1945).

Petitioner and respondent agree the question of whether to place the child with petitioner, or let her remain in foster care, is one involving a substantial right. Respondent claims the question of increasing visitation time is not substantial, and that neither decision will materially affect the final decision regarding termination of petitioner's rights or custody of the child. The juvenile court order, respondent says, merely indicates more evaluation is necessary. It is petitioner's contention that if visitation is not increased, or the child returned to her, it will so jeopardize the parent-child relationship that it will control the

ultimate decision. Petitioner points out the recommendation of the case worker that if petitioner does not take positive steps within 90 days, action should be taken toward a final determination regarding petitioner's parental rights and the child's status.

While the decision of the juvenile court not to place the child with the petitioner or allow visitation will impact the final decision of custody, we cannot say its affect will be material. The material affect will come not from placement or visitation decision, but, as indicated by the order, will result from the mother's positive or negative actions. Her claims that the restrictions placed on her contact with the child have hindered development of their relationship are best addressed at the final decision. Her rights to be with her child are not such that they cannot be protected by appeal from final judgment. Because of the continuing nature of the juvenile court's jurisdiction, visitation may well increase, or the child could be placed with her. We determine the order of the juvenile court does not involve substantial rights that will materially affect the final decision, and the interests of justice require us to dismiss the interlocutory appeal.

APPEAL DISMISSED.