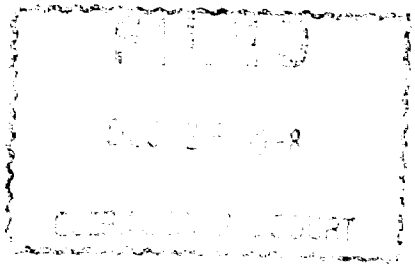
IN THE COURT OF APPEALS OF IOWA

No. 8-669 / 98-0696
Filed December 28, 1998



IN THE INTEREST OF M.D.B., Minor Child,

B.B., Father,
Appellant.

Appeal from the Iowa District Court for Linn County, Nancy A. Baumgartner, District Associate Judge.

Father appeals from a juvenile court dispositional order placing the primary physical care of the minor child with the child's mother. **AFFIRMED.**

Anne M. Laverty of Mullin & Laverty, P.L.C., Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Mary W. Vavroch, Assistant Attorney General, and Rebecca Belcher, Assistant County Attorney, for appellee-State.

Lorraine K. Ingels, Cedar Rapids, guardian ad litem for minor child.

Anna Wirt O'Flaherty of the O'Flaherty Law Firm, Swisher, for mother.

Considered by Sackett, C.J., and Huitink, Streit, Vogel, and Mahan, JJ.

HUITINK, J.

I. Background Facts and Proceedings.

Misty B. was born on May 26, 1985, to Christina M. and Bruce B. Christina and Bruce were never married. Shortly after Misty was born, Bruce and his girlfriend took her from the hospital and raised her for the first seven to eight years of her life. Christina relinquished custody of Misty to Bruce because she feared for her life if she did not.

Not until Bruce was serving time in prison for multiple domestic abuse offenses was Christina able to locate Misty and begin to establish a relationship with her. Christina petitioned for and was granted temporary custody of Misty on January 25, 1995. Misty has lived with Christina since that date. On September 1, 1995, Bruce and Christina stipulated they would have joint custody of Misty, with primary physical care being placed with Christina.

Misty began having difficulties adapting to her new home and three new siblings in January 1997. She was placed in youth shelters for behavioral difficulties on three occasions between January 1997 and June 18, 1997. Subsequent to the June 1997 shelter placement, the State filed a petition alleging Misty was a child in need of assistance (CINA).

On July 1, 1997, the parties stipulated Misty was a child in need of assistance and the juvenile court adjudicated her to be in need of assistance pursuant to Iowa

Code sections 232.2(6)(c)(2) and 232.2(6)(f) (1997). Misty has remained in Christina's care since August 22, 1997.

At the dispositional hearings, Bruce expressed a desire to have Misty's custody placed with him, while Christina desired to maintain custody of Misty. When asked by the court, Misty testified she wished to be placed in her father's custody. Conversely, the child's attorney and guardian ad litem, the child's CASA volunteer, and the Iowa Department of Human Services all unanimously recommended Misty's custody be placed with Christina.

The court concluded Misty was in no physical or emotional danger at Christina's home. It found Christina was working very hard to provide a stable environment and her relationship with Misty had substantially improved despite Bruce's attempts to undermine the relationship. Thus, the court held it was in Misty's best interests that her custody remain with Christina, with liberal visitation by Bruce.

On appeal, Bruce contends the juvenile court erred in placing Misty's custody with Christina. He believes Christina should not have primary physical care because of her abuse of Misty, and her unwillingness to communicate with him or cooperate with visitation.

II. Standard of Review.

Our review of CINA proceedings is de novo. Accordingly, we review both the facts and the law, and adjudicate rights anew as to those issues which have been properly preserved and presented. *In re D.L.*, 401 N.W.2d 201, 202 (Iowa App.1986).

We accord considerable weight to the fact findings of the juvenile court, especially concerning the credibility of witnesses, but we are not bound by those findings. *In re W.G.*, 349 N.W.2d 487, 491-92 (Iowa 1984).

III. The Merits.

In reviewing CINA proceedings, our supreme concern lies with the child's welfare and best interests. *In re N.M.W.*, 461 N.W.2d 478, 480 (Iowa App. 1990). The provisions of Iowa Code chapter 232 are to be liberally construed to protect the welfare of the child. *In re B.B.*, 440 N.W.2d 594, 596 (Iowa 1989).

Iowa Code section 232.101(1) allows courts the authority to enter an order permitting the child's parent, guardian, or custodian at the time of the filing of the CINA petition to retain custody of the child subject to the terms and conditions that assure the proper care and protection of the child. *See* Iowa Code § 232.101(1). This section expresses a preference for a parent to keep legal custody of a child whenever possible, but it does not exclude a parent who has a right of legal custody, but does not share physical custody of the child prior to the commencement of CINA proceedings. *See In re J.R.H.*, 358 N.W.2d 311, 319 (Iowa 1984). A transfer of custody under Iowa Code section 232.102(5) cannot be made absent a showing of clear and convincing evidence demonstrating the child cannot be protected from some

harm which would justify a child in need of assistance adjudication.[1] *See In re D.R.H.*, 498 N.W.2d 920, 923 (Iowa App. 1993).

The juvenile court found a lack of clear and convincing evidence demonstrating Misty was in any danger in Christina's home or Christina lacked the ability to protect Misty from harm. We agree with the juvenile court's determination. In its dispositional order, the juvenile court stated:

> The court has no concerns that the child is in danger, either emotionally or physically, living in her mother's home. Misty lives with her mother and two teenage siblings in a neat and tidy home and, while the family is not wealthy, their financial needs are met by their mother's efforts. The mother has struggled, and not given up in dealing with a very troubled child. Misty had a very chaotic life with her father, and since she did not know her mother until she was nearly eight years old, the transition into her mother's home was understandably difficult. *** Despite these problems, the mother has worked very hard with all therapists and social workers involved with her family, and is a very

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[1] Iowa Code section 232.102(5) provides:

> Whenever possible the court should permit the child to remain at home with the child's 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.
>
> 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.

> effective parent. *** All reports indicate that the family is functioning substantially better than when Misty first came into the Juvenile Court system in June of 1997. This is in large part attributable to the efforts of Misty's mother and Misty herself. This speaks volumes on the part of Misty's mother and her ability to hang in there with this difficult daughter, with the constant interference of the child's father and his undermining of the child's relationship with her mother.

Our review of the entire record convinces us the juvenile court was correct in its assessment of Misty's development and Christina's parenting abilities and attitude.

While the record reflects Christina has taken substantial steps to develop Misty into a well-adjusted, stable child, the record is replete with evidence demonstrating Bruce's constant meddling and interfering with Christina's best efforts. Our review of the record supports the juvenile court's view of Bruce as an ineffective and unsuitable parent for Misty. Accordingly, we find no error in the juvenile court's disposition, as the record contains virtually no evidence demonstrating Misty is subject to any danger in her mother's home, and even less evidence that Christina is either unwilling or ill-equipped to protect Misty from harm if she maintains custody. The juvenile court's disposition is affirmed.

AFFIRMED.