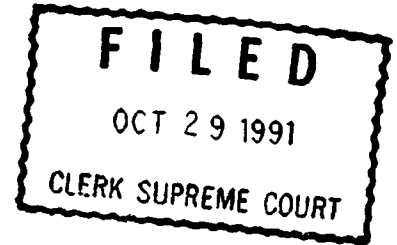


IN THE COURT OF APPEALS OF IOWA

No. 1-362 / 91-228



IN THE INTEREST OF

J.C.,

Minor Child.

G.R.C. and L.C.,

Appellants.

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Appeal from the Iowa District Court for Emmet County,
David C. Larson, Alternate District Associate Judge.

The parents appeal a modification of a CINA
adjudication removing their child from their custody.

AFFIRMED.

John L. Sandy of the Sandy Law Firm, Spirit Lake, for
appellants.

Bonnie J. Campbell, Attorney General; John M. Parmeter,
Assistant Attorney General; and Katherine S. Miller-Todd,
Assistant Attorney General, for appellee State.

Heard by Oxberger, C.J., and Donielson and Habhab, JJ.

HABHAB, J.

The minor child, J.C., was born on October 20, 1982, to G.R.C. and L.C. The father is employed and has been for the past fifteen years. The mother is a passive individual, with a history of health problems.

J.C. first came to the attention of the Department of Human Services on January 24, 1983, after she was hospitalized for concerns regarding failure to thrive. During the next five years, the family was investigated a number of times for child abuse. During this period, the family also received help from a number of state services, such as housekeeping and supervision.

In August 1988, the first "founded" child abuse incident was reported, a denial of critical care due to inadequate supervision by the mother. J.C. had been examined a year earlier by the Spencer Pediatric Consultation Clinic. At that time, the clinic had recommended J.C. be admitted to the University Hospital School. However, her admission was delayed due to the parents' reluctance to consider the recommendation. J.C. was ultimately admitted to the University Hospital.

While at the hospital, J.C. was diagnosed as having low average to borderline intelligence, significant language disorder, and attention-deficit hyperactivity disorder. The diagnosis concluded that J.C. would be a difficult child for any parent to manage. It further stated she required special parenting skills and behavioral

techniques. The report noted the parents' continued denial and failure to recognize J.C. as a child with special needs was detrimental to her future development.

In January 1989, a comprehensive family assessment was conducted by Northwest Iowa Mental Health Center. According to the assessment, both parents love J.C. and want her to be healthy and happy. However, neither understood they needed to change their own behavior in order to help J.C. Health Center services were discontinued in May 1989 because the parents had done little to change their behavior patterns. Further, J.C. had shown no significant improvement in such areas as soiling her pants.

In September 1989, J.C. entered kindergarten. The teachers had to spend considerable time toilet training her. They also taught her proper table manners. She cried frequently and often hit people and herself. The teachers made some progress in modifying J.C.'s behavior. However, her outbursts and wetting and soiling her pants were not completely eliminated.

In August 1988, the first of four founded child abuse reports on J.C. was filed. This first report was a founded denial of critical care due to inadequate supervision. In February 1989, a child sex abuse report was founded. Apparently the parents' nephew sexually abused her. In December 1989, a number of bruises on her body were observed. These came from a spanking administered by her

father which resulted in another founded child abuse report. In March 1990, grab marks and bruises were observed on J.C.'s body. This founded incident stemmed from her father's attempt to hold her down during one of her behavioral outbursts.

On August 9, 1990, a child in need of assistance petition was filed on behalf of J.C., at which time both parents stipulated J.C. was a child in need of assistance pursuant to Iowa Code section 232.2(6)(b). On August 29, 1990, the court entered an order adjudicating J.C. as a child in need of assistance (CINA). It ordered she remain in the custody of her parents. On January 10, 1991, the State filed a motion to modify, requesting the child be removed from the custody of her parents and placed in temporary foster care.

On January 17, 1991, the State filed an amendment to the motion pursuant to Iowa Code sections 232.2(6)(b) and 232.2 (c)(2). Following a two-day hearing, the district court entered a modification order placing J.C. in foster care. The court ruled a substantial change in circumstances had occurred. The court excluded the parents from the courtroom at the time J.C. was being interviewed. The judge presiding over the hearing was an alternate district associate judge. The parents have appealed from the determination to transfer custody.

The parents contend the trial court erred by ordering a transfer of custody without entering specific findings of

fact as required by Iowa Code section 232.102. They argue the district court made no findings regarding physical abuse and only vague references to harmful effects. The parents also maintain there is no substantial evidence to support the findings J.C. had been physically abused by either of them. They also point out J.C. has the mental development of a four-year-old, and her screams she hated her father are the result of her emotional instability and not due to any reasonable fear.

The parents also maintain their due process rights were violated when the trial court ordered they be excluded from the courtroom when J.C. was being examined. They claim their right to cross-examine J.C. was curtailed. The parents lastly contend the alternate district associate judge did not have the authority to hear the case. They contend alternate district associates have no express authority to hear juvenile cases, except when appointed by the chief judge of the judicial district.

Appellate review of a juvenile court's finding of a child in need of assistance is de novo. In the Interest of J.R.H., 358 N.W.2d 311, 317 (Iowa 1984). Of paramount concern is the welfare and best interest of the child. In the Interest of D.L., 401 N.W.2d 201, 202 (Iowa App. 1986). In determining what is in the best interest of the child, the court necessarily looks at the present conditions and past performance "for that performance may be indicative of the quality of the future care that parent

is capable of providing." In the Interest of Dameron, 306 N.W.2d 743, 745 (Iowa 1981). See also, In re Loeffelholz, 162 N.W.2d 415, 419 (Iowa 1968).

The reviewing court must review the record to determine whether the finding of a child in need of assistance is supported by clear and convincing evidence. Iowa Code § 232.96(2) (1989). Although, on review, the court is not bound by the findings of the juvenile court, "we give weight to the juvenile court's findings of fact because the juvenile court has had the unique opportunity to hear and observe the witnesses first hand" In the Interest of S.V., 395 N.W.2d 666, 668 (Iowa App. 1986).

We turn to the parents' objections to the trial court's modification of the CINA proceedings. We address them in the order presented.

I. Specific Findings.

J.C.'s parents object the trial court failed to make findings as required by law. The section of the Iowa Code specifically referred to states:

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. [Emphasis added.]

Iowa Code § 232.102(5).

Apparently the parents' objections are in reference to the trial court's written modification order. Our review of the transcript reveals the trial court in fact made extensive oral findings. These findings fulfilled the statutory requirements.

The statute in question does not require the trial court make written findings. In another provision of this same section, the legislature specifically mandates written findings of fact be made. See Iowa Code § 232.102(3). If the legislature wanted to require written findings in this instance, it would have so specified.

The parties were apprised of the trial court's findings and reasoning. A written transcript was made. Both the litigants and this court on appeal may thus examine the trial court's findings and reasoning for error. The reasons for making findings are therefore fulfilled. We determine the trial court's oral findings met the requirements of the statute. We affirm the trial court on this issue.

II. Modification.

The parents next argue there was not a substantial change in circumstance since the original CINA adjudication to justify this modification of its prior order.

We begin our analysis by pointing out it is not necessary to find the original grounds for adjudication still exist. It is enough if any of the grounds listed in Iowa Code section 232.2(6) can be proved by clear and convincing evidence. See cf., In re A.M.S., 419 N.W.2d 723, 725 (Iowa 1988). The court may only modify the original placement order if it finds by clear and convincing evidence that a substantial change in circumstances existed. In re Leehey, 317 N.W.2d 513, 516 (Iowa App. 1982).

The trial court found such a change in circumstances in the present case. This change in circumstance comported with the definitional grounds of a child in need of assistance set forth in Iowa Code section 232.2(6). The court found family-centered services had been exhausted. The child has new-found fear of her parents. There have been extreme behavioral problems at school. There has been little or no apparent progress in the parents' development of adequate parenting skills. More basically, there is evidence the parents do not or cannot see the need to develop those skills necessary to adequately care for this mentally and emotionally disturbed child.

We have reviewed the trial court's findings. We conclude they are supported by clear and convincing evidence. The trial court was motivated by the child's best interests. We determine there is a substantial change in

circumstances justifying a modification of the original CINA order. We affirm the trial court on this issue.

III. Exclusion of Parents from Courtroom.

The parents next object the trial court erred in excluding them from the courtroom while their daughter testified. The parents argue the pertinent provisions of the Iowa Code permit their presence. They also argue their due process rights under the United States and Iowa Constitutions were violated by their exclusion.

Iowa Code section 232.91, relating to CINA proceedings, provides:

Any hearings or proceedings under this division subsequent to the filing of a petition shall not take place without the presence of the child's parent, guardian, custodian, or guardian ad litem in accordance with and subject to to section 232.38. A parent without custody may petition the court to be made a party to proceedings under this division.

We turn to Iowa Code section 232.38. That section provides in pertinent part:

2. In any such hearings or proceedings the court may temporarily excuse the presence of the parent, guardian or custodian when the court deems it in the best interests of the child. Counsel for the parent, guardian or custodian shall have the right to participate in a hearing or proceeding during the absence of the parent, guardian or custodian.

We determine the trial court was within its statutory authority in temporarily excluding the parents. Additionally, we determine the trial court was within its discretion in excluding the parents. There is evidence the

child was afraid of her father. The court needed to hear the testimony of the child, without the negative influence of fear of a particular parent. The trial court was present at the hearing and best able to judge the dispositions of the parties and the child's own state of mind. It acted in accordance with the best interests of the child in excluding the parents.

The parents additionally argue their due process rights under the United States and Iowa Constitutions were violated by their exclusion. However, they failed to object on these grounds at the proceeding. Constitutional questions raised for the the first time on appeal are too late. Long v. Long, 255 N.W.2d 140, 144 (Iowa 1977); In re Robbins, 230 N.W.2d 489, 494 (Iowa 1975). Additionally, we point out, and the parents agree, there is no right to confrontation in CINA proceedings. In re L.K.S., 451 N.W.2d 819, 822 (Iowa 1990). We affirm on this issue.

IV. Cross-Examination of J.C.

The parents next contend they were denied their right to effectively cross-examine J.C. The trial court indicated it usually did not allow the parties to cross-examine the child witnesses without the permission of the guardian ad litem. However, the parents' attorney indicated he would carefully phrase his questions and the guardian ad litem assented. The parents' attorney agreed to this arrangement and further agreed to stop if the

guardian ad litem in fact objected. In fact, the guardian ad litem did not object, so the cross-examination was not interrupted.

We determine from the record the parents never objected to this arrangement at the trial level. As stated above, objections not raised at the trial court level are waived on appeal. Long, 255 N.W.2d at 144; Robbins, 230 N.W.2d at 494. Finally, as it appears no actual stop was put to the parents' cross-examination, there was no discernible curtailment of their due process rights in this regard.

We determine the parents' objection to the cross-examination procedure is without merit. We affirm the trial court on this issue.

V. Alternate Associate Judge's Authority.

In their final assignment of error, the parents contend the alternate district associate judge was without authority to act in their case. They assert the associate judge was from a different county and had not been appointed to act in their case as required by law.

The parents do not question the subject matter jurisdiction of the trial court. There is no question the associate judge had the statutory authority to act in juvenile matters. The only question is whether this particular judge's authority depended on whether he was from that particular county and whether a proper appointment was necessary.

We dispose first of the contention the associate district judge may serve only in the county of his or her appointment. The statute in question governs both associate and alternate associate district judges. The pertinent section provides:

A district associate judge must be a resident of a county in which the office is held during the entire term of office. A district associate judge shall serve within the judicial district in which appointed as directed by the chief judge, and is subject to reassignment under section 602.6108.

Iowa Code § 602.6305(3) (emphasis added).

Iowa Code section 602.6108 provides:

The chief justice of the supreme court shall assign judicial officers and court employees from one judicial district to another, on a continuing basis if need be, in order to handle the judicial business in all districts promptly and efficiently at all times.

Section 602.6305(3) clearly states the associate judge shall have immediate authority to serve anywhere in the judicial district in which he or she works. They are, of course, required to be a resident of the county from which they are appointed. They are not, however, restricted to work only in that county.

We next face the question of whether this particular judge, allegedly an alternate district associate judge, had authority to act in this particular case.

Iowa Code section 602.6303(4) provides:

The chief judge of the judicial district may order that the alternate temporarily sit in place of the regular district associate judge while the latter is unable to act. The words "unable to act" mean a temporary absence from court duties, including a reasonable vacation period.

The parents allege the regular associate district judge was available and able to act in this case. Thus, they contend the alternate was without authority to act.

The parents have not directed us, nor do we find, where in the record this issue was raised. See Iowa R. App. P. 14(a)(5). All we have before us is the parents' bare allegation that the alleged circumstances exist. It appears this questionable issue is raised for the first time on this appeal. We determine the parents have not preserved this issue for appeal.

To avoid further litigation on this issue, we think it of benefit to the bench and bar that we add this special note. In the event the chief judge of the judicial district determines to call an alternate, the order referred to in section 602.6303(4) should be in writing and placed of record where the alternate is to preside. The order should set forth the basic requirements of section 602.6303(4).

In conclusion, we affirm the trial court on all issues. Costs of this appeal are taxed to the appellants.

AFFIRMED.