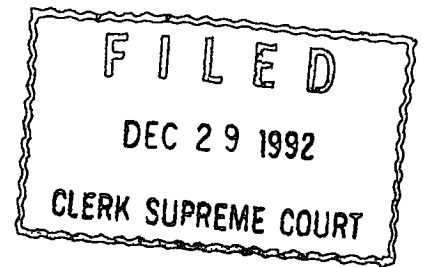


IN THE COURT OF APPEALS OF IOWA

No. 2-481 / 91-1610



IN THE INTEREST OF B.B., A Child,
A.B. and A.B., Father and Mother,
Appellants.

Appeal from the Iowa District Court for Tama County,
Patrick Grady, Juvenile Court Judge, and Jane Spande,
District Associate Judge.

The mother and father appeal a juvenile court order,
following an adjudication review hearing, removing their
child from the family home; they also appeal a juvenile
court order adjudicating their child to be a CINA and the
subsequent dispositional order continuing foster care for
their child. **REVERSED.**

Patrick L. Wilson of Wilson Law Office, Marshalltown,
for appellants.

Bonnie J. Campbell, Attorney General; John M. Parmeter,
Special Assistant Attorney General; Judy A. Sheirbon,
Assistant Attorney General; and Brent Heeren, County
Attorney, for appellee State.

Stephen A. Kenkel of Mickelson, Roan, Appelgate &
Kenkel, Toledo, guardian ad litem for the child.

Heard by Donielson, P.J., Habhab, J., and Keefe, S.J.*
Schlegel, J., takes no part.

*Senior Judge from the 1st Judicial District serving on
this court by order of the Iowa Supreme Court.

HABHAB, J.

FACTS

This is a protracted case involving a mildly, mentally retarded child, Brad Brown,¹ age fifteen. In 1989, Brad was adjudicated a child in need of assistance (CINA) pursuant to Iowa Code section 232.2(6)(c)(2). See In re B.B., 440 N.W.2d 594 (Iowa 1989). At the dispositional hearing, the parents were allowed to keep Brad in their home on the condition that they sent him to special education classes in the public schools. When they failed to adhere to this condition, they were jailed on contempt orders, and Brad was placed in foster care.

The parents later appealed a review order continuing foster care due to the mother's refusal to send Brad to school. On appeal, we entered an order affirming the juvenile court order continuing Brad's placement in foster care during the time when he was in school. We also ordered unsupervised in-home visits between Brad and his family when school was not in session. See In re B.B., No. 0-732/90-935, slip op. (Iowa App. Feb. 26, 1991).

In September 1991, a review hearing was held, and the parents sought to have Brad returned to their home. However, the parents had failed to register Brad in fall classes. The mother continued to assert the child was too ill to attend school. The juvenile court gave the parents

¹This is not the child's given name; his initials are B.B.

one last chance to allow the child to attend school and remain in the home. It ordered the trial home placement to continue until October 10, 1991, at which time the child would be returned to foster care unless it was proven the child had been registered in school and had attended classes at least five consecutive days. The parents failed to comply with these conditions, and the juvenile court subsequently ordered placement of the child in foster care. The parents appeal this order entered following the adjudication review hearing.

The parents also appeal from adjudication and dispositional orders entered on an amended CINA petition. In October 1991, the State filed a motion to amend the CINA petition with new and supplemental allegations that as a result of the mental capacity or condition of Brad's parents he was not receiving adequate care. See Iowa Code § 232.2(6)(n) (1991). The parents filed a resistance. The court granted the motion to amend. In addition, the guardian ad litem filed an application to terminate parental visits with Brad alleging the parents acted inappropriately during visitations. The parents filed a resistance.

In February 1992, the juvenile court adjudicated Brad to be a CINA pursuant to Iowa Code section 232.2(6)(n). It did not terminate visitations between the family but established guidelines for visitations. In April 1992, the juvenile court entered a dispositional order continuing

foster care. It found that placement of the child in his parents' home would have a detrimental affect upon him. The parents appeal the order adjudicating Brad to be a CINA pursuant to Iowa Code section 232.2(6)(n) and the subsequent dispositional order continuing foster care.

The two appeals have been consolidated for our review. The guardian ad litem filed joinder with the State's brief. We reverse.

SCOPE OF REVIEW

Appellate review of a juvenile court's finding of a child in need of assistance is de novo. In re J.R.H., 358 N.W.2d 311, 317 (Iowa 1984). Of paramount concern is the welfare and best interest of the child. In re 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 re 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 re S.V., 395 N.W.2d 666, 668 (Iowa App. 1986).

ANALYSIS

After reviewing the unique circumstances of this case, we find it is in Brad's best interest to remain in his parents' home. We note the following excerpt from the case permanency plan the DHS caseworker, Kelly Arends, filed in August 1991:

* * * *

[A]lthough it is probably that DHS workers, attorneys and the juvenile court system could struggle with this family until the child reaches majority age and keep [Brad] . . . in foster care so that he may attend school when he does reach the age of majority he will be returned to the family home. Although [Brad] . . . may gain some benefit from attending school while in foster care, the Department questions whether there is any value in separating the child again from his family to adjust to a completely new setting, as he is not able to return to the former foster home, when the end result of all of the Department's interventions will be the same as if there is no further intervention at all. With this in mind, the Department does not deem it in the best interest of the child to remove the child from the home to again place him in a foster home that will probably be quite distant from the parental home while his parents become increasingly resistant and embittered towards providers until he reaches the age of majority at which time he will return to his family which is where he is at now.

(emphasis added).

Iowa Code section 232.102(5) provides in pertinent part:

5. Whenever possible the court should permit the child to remain at home with the child's parent, guardian or custodian. . . .

Iowa Code § 232.102(5) (1991).

The case permanency plan clearly states it is in Brad's best interest to remain in his parents' home, rather than be placed in a foster home a great distance away from his family. The ultimate goal stated in the permanency plan is family unification. The child's age is a factor in this recommendation by the DHS. Brad is presently fifteen-years-old. In a few short years, he will reach the age of majority and will return home to live with his parents. The caseworker testified the amount of schooling Brad will receive from now until his eighteenth birthday will not greatly change his level of ability, therefore, in her opinion, he might as well return home now. The record also reveals Brad desperately misses his parents when he is separated from them. We do not find clear and convincing evidence Brad will suffer harm if allowed to remain in his parents' home. The record reveals Brad receives love and adequate care from his parents. There have been no allegations of abuse by Brad's parents. We find it is in Brad's best interest to remain in his parents' home.

We reverse the juvenile court's dispositional order, entered following an adjudication review hearing, removing Brad from his parents' home. We also reverse the juvenile court's order adjudicating Brad to be a CINA pursuant to Iowa Code section 232.2(6)(n) and the subsequent

dispositional order continuing foster care. Brad shall remain in his parents' home.

Costs of this appeal are taxed to the appellee.

REVERSED.