

IN THE COURT OF APPEALS OF IOWA

No. 17-1521
Filed December 20, 2017

**IN THE INTEREST OF A.N.,
Minor Child,**

**J.J., Father,
Appellant.**

Appeal from the Iowa District Court for Black Hawk County, Daniel L. Block,
Associate Juvenile Judge.

A father of a child appeals adjudicatory and dispositional orders declining
to place the child with him. **AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED.**

Colin R. McCormack of Van Cleef & McCormack Law Firm, L.L.P., Des
Moines, for appellant.

Thomas J. Miller, Attorney General, and Mary A. Triick, Assistant Attorney
General, for appellee.

Melissa A. Anderson-Seeber, Juvenile Public Defender's Office, Waterloo,
guardian ad litem for minor child.

Considered by Vaitheswaran, P.J., and Potterfield and McDonald, JJ.

VAITHESWARAN, Presiding Judge.

A father of a child appeals adjudicatory and dispositional orders declining to place the child with him.

I. Background Facts and Proceedings

A jailed mother gave birth to a child in 2017. The child was temporarily removed from her care and was transferred to the custody of the department of human services for placement in foster care. The father named in the temporary removal orders and the child-in-need-of-assistance (CINA) petition turned out to be someone other than the biological parent. Once the biological father was identified, the State amended its petition to name him. The biological father and his attorney participated in the adjudicatory and dispositional hearings.

Following both hearings, the juvenile court confirmed that custody of the child would remain with the department for continued placement in foster care. The father appealed. The State preliminarily responds with a mootness argument.

II. Mootness

“An issue is moot if it no longer presents a justiciable controversy because it has become academic or nonexistent.” *In re B.B.*, 516 N.W.2d 874, 877 (Iowa 1994) (quoting *In re Meek*, 236 N.W.2d 284, 288 (Iowa 1975)). The State asserts that to the extent the father is “claiming the court erred in declining to place [the child] in his care between the time of adjudication and disposition, the issue is moot.”

Under our precedent, “[a]ny error committed in granting [a] temporary ex parte order cannot . . . be remedied” where a court reconfirms custody in a subsequent dispositional order. See *In re A.M.H.*, 516 N.W.2d 867, 871 (Iowa

1994). The State hangs its hat on this proposition. But the father is not challenging the substance of the initial removal orders; he is challenging the *absence of* “a formal removal of [the child] from him.” This distinct issue could be raised post-removal. Indeed, the issue could only be raised post-removal because the father had no notice of the removal proceedings. See *In re J.C.*, 857 N.W.2d 495, 501 (Iowa 2014) (“CINA proceedings may not take place without the presence of statutorily identified necessary parties.”). The question of the absence of a removal order naming the father is not moot and we proceed to the merits of that issue.

III. Absence of Formal Removal Order as to Father

At the time of the removal proceedings, all involved assumed someone else was the father. The juvenile court formally removed the child from the mother and putative father. Because the putative father was not the biological father, the removal order operated as a formal removal of the child from the mother alone. The father essentially argues a removal from only one of two biological parents is impermissible. We disagree.

Iowa Code section 232.78(1)(a) (2017) authorizes removal if “[t]he person responsible for the care of the child is absent.” The mother was responsible for the care of the child and, by virtue of her incarceration, was absent. Her absence was enough to support an order transferring the child’s custody to the department. See *In re K.H.*, No. 17-0384, 2017 WL 2189769, at *2 (Iowa Ct. App. May 17, 2017) (“K.H.’s formal removal from his mother was ‘sufficient to start the statutory timelines counting toward termination as to both’ parents.”); *In re C.H.*, No. 16-2179, 2017 WL 1278368, at *3 (Iowa Ct. App. Apr. 5, 2017) (“Because we construe

the word ‘parents’ to include both singular and plural, see Iowa Code § 4.1(17), we find the requirement that C.H. and F.H. be ‘removed from the physical custody of the parents’ includes removal from either parent.”); *In re Z.G.*, No. 16-2187, 2017 WL 1086227, at *4 (Iowa Ct. App. Mar. 22, 2017) (“Because the child had been removed from the mother’s care for the requisite period of time, we conclude it was not necessary for the State to prove the child was removed from the father’s care.”); *In re A.F.*, No. 16-2098, 2017 WL 936207, at *3 (Iowa Ct. App. Mar. 8, 2017) (“[T]he requirement that the child be removed from the ‘parents’ thus means either or both parents.”); *In re K.S.*, No. 16-1928, 2017 WL 936199, at *4 (Iowa Ct. App. Mar. 8, 2017) (“Because a formal removal hearing involving the father took place and the district court relied on an actual change of physical custody from the father, the statutory removal requirements were met.”); *cf. In re C.F.-H.*, 889 N.W.2d 201, 207 n.2 (Iowa 2016) (construing the term “remove” “to require a change from physical custody to lack of physical custody” but “express[ing] no view on the question of whether a removal of the child from one parent is sufficient to support termination of parental rights of a noncustodial parent”).

IV. Inclusion of Father in Adjudicatory Order

On a related note, the father challenges the juvenile court’s adjudication of the child as a child in need of assistance based on the father’s “alleged ‘inability to provide adequate supervision.’” He suggests his conduct was insufficient to adjudicate the child a child in need of assistance.

The court adjudicated the child pursuant to two statutory provisions: Iowa Code subsections 232.2(6)(c)(2) and 232.2(6)(j). We will address the court’s conclusions under both provisions. See *In re J.S.*, 846 N.W.2d 36, 40 (Iowa 2014)

(addressing challenged ground for adjudication notwithstanding presence of uncontested grounds, because the basis for adjudication could affect a ground for termination).

Section 232.2(6)(c)(2) defines a child in need of assistance as an unmarried child “[w]ho has suffered or is imminently likely to suffer harmful effects as a result of . . . the failure of the child’s *parent*, guardian, custodian, or other member of the household in which the child resides to exercise a reasonable degree of care in supervising the child.” (Emphasis added.) Use of the singular ‘parent’ permits an adjudication based on one parent’s actions. See Iowa Code § 232.2(39) (defining “parent” as “a biological or adoptive mother or father of a child”); *id.* § 4.1(17) (“Unless otherwise specifically provided by law the singular includes the plural, and the plural includes the singular.”); *cf. In re N.M.*, 491 N.W.2d 153, 155 (Iowa 1992) (construing “parents” in Iowa Code section 232.116(1)(d) to require proof of a custody transfer from one parent rather than both parents).

The juvenile court appropriately adjudicated the child a child in need of assistance under section 232.2(6)(c)(2) based on evidence indicating the mother endangered the life of another child. The father’s attorney conceded as much at the adjudication hearing, stating, “[W]e don’t necessarily disagree with the adjudication under (c)(2).” Because the mother’s conduct was sufficient to support the adjudication under this section, we need not determine whether the father’s conduct also would have supported an adjudication under section 232.2(6)(c)(2).

We turn to section 232.2(6)(j). This provision allows a child to be adjudicated in need of assistance where the child is “without a parent, guardian, or other custodian.” Iowa Code § 232.2(6)(j). At the conclusion of the adjudicatory

hearing, the juvenile court found that the State was “only required to prove the petition at the time of the filing of the petition” and “at the time of the filing of the petition there was no parent available.” However, the State amended its petition to name the biological father and, at the end of the adjudicatory hearing, requested adjudication of the child only under section 232.2(6)(c)(2).

We conclude the State failed to prove adjudication was warranted under section 232.2(6)(j). The child was not without a parent; the father was available. See *In re T.S.*, No. 02-0121, 2003 WL 183773, at *2 n.2 (Iowa Ct. App. Jan. 29, 2003) (noting children were not “without a parent,” as their father still had parental rights, regardless of his no-contact order). We reverse the adjudication under section 232.2(6)(j).

V. Placement of Child

We are left with the crux of the appeal: the juvenile court’s refusal to place the child with the father following the adjudicatory and dispositional hearings. On this point, the father contends the court impermissibly shifted the burden to him to prove the child could be safely placed in his care and failed to make findings of fact establishing his failure to supervise the child. See Iowa Code § 232.96(2) (placing burden on the State to prove the allegations contained in a child-in-need-of-assistance petition); *id.* § 232.96(10)(a) (“The grounds for each determination must be explicitly documented and stated in the court order.”). On our *de novo* review, we disagree with the father’s argument.

At the adjudicatory hearing, the department case manager testified the department simply did not have enough information about the father to determine whether the child could be placed with him. While her preliminary investigation

disclosed some concerns about the father's past drug use, she stated drug testing and an evaluation would be necessary before the department could recommend placement with the father.

In its adjudicatory order, the juvenile court echoed the department's preliminary concerns. The court elected to retain custody of the child with the department for continued placement in foster care pending the father's participation in services and pending further investigation by the department. The father's attorney agreed "services [were] appropriate" and stated he did not "begrudge an investigation" but stated the department could undertake both with the child in the father's care. However, the father's admission to prior drug use raised sufficient concern at the time of the adjudicatory hearing to justify the department's deferral of a parental placement decision.

As it turned out, the concern was justified. Following the adjudicatory hearing, the father twice tested positive for methamphetamine and the juvenile court found "substantial concerns regarding [the father's] ability to supervise the child and provide adequate care." See *id.* § 232.2(6)(c)(2). In its dispositional order, the court concluded "placement in family foster care [remained] the least restrictive placement available to the court and in the child's best interests." We agree with this conclusion. See *In re J.S.*, 846 N.W.2d at 41 (stating children suffered or were imminently likely to suffer harmful effects as a result of a mother's active methamphetamine use and consequent "failure to exercise a reasonable degree of care in supervising them").

VI. Disposition

We affirm the adjudicatory order to the extent the adjudication was based on Iowa Code section 232.2(6)(c)2). We affirm the dispositional order. We reverse that portion of the adjudicatory order premised on Iowa Code section 232.2(6)(j). We remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.