

IN THE COURT OF APPEALS OF IOWA

No. 0-003 / 09-1827
Filed January 22, 2010

**IN THE INTEREST OF J.S.,
Minor Child,**

**A.S.S., Father,
Appellant.**

Appeal from the Iowa District Court for Polk County, Karla J. Fultz, Associate Juvenile Judge, and Joe E. Smith and Carol S. Egly, District Associate Judges.

A father appeals the juvenile court's modification of a dispositional order.

AFFIRMED.

Jared C. Harmon, Des Moines, for appellant father.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, John P. Sarcone, County Attorney, and Jon Anderson, Assistant County Attorney, for appellee State.

Victoria Meade, West Des Moines, for appellee mother.

Kimberly Ayotte of Youth Law Center, Des Moines, for minor child.

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

POTTERFIELD, J.

A father appeals from the juvenile court's order modifying a dispositional order in this child-in-need-of-assistance (CINA) proceeding.

I. BACKGROUND FACTS AND PROCEEDINGS.

J.S. was removed from her mother's custody in February 2009 due to the mother's on-going substance abuse issues. J.S.'s maternal grandmother, Robyn, was not an appropriate caretaker. By stipulation of all parties, J.S. was placed in the care of her great-grandmother and her husband, Beverly and Harley.

J.S. was adjudicated CINA in March 2009, with temporary legal custody remaining with Beverly and Harley.

In April 2009, the juvenile court (Judge Karla Fultz) entered a dispositional order, which adopted the case permanency plan recommending continued care with Beverly under the supervision of the Iowa Department of Human Services (DHS).

In September 2009, the State filed an application for modification of placement. The application asserted the facts supporting the modification were: "parents whereabouts are unknown + current relative placement is unable to adopt." An order was entered that same date placing J.S. in the temporary legal custody of DHS for foster care. A modification hearing was scheduled and, on October 1, 2009, the motion to modify was overruled. The court wrote, "There is insufficient evidence to sustain motion. Child shall be returned to Beverly."

On October 12, 2009, the juvenile court (Judge Joe Smith) entered an order, which provided in part:

The Court finds that on October 1, 2009, the child was returned to the custody of her maternal great-grandmother, Beverly The court is informed that [Beverly] has informed DHS that, due to health issues with a family member, she is unable to take custody of the child until those issues resolve.

The child, [J.S.], shall remain in DHS custody for foster care until the maternal great-grandmother is able to take custody.

On October 22, 2009, J.S.'s CINA proceeding was transferred to the docket of Judge Carol S. Egly and set for review hearing on January 19, 2010.

On November 4, 2009, J.S.'s attorney and guardian ad litem filed a motion to modify dispositional order noting the previous ruling finding insufficient evidence to keep the child in foster care rather than with the great-grandmother, Beverly; the October 12, 2009 order noting Beverly's inability to take custody at that time; concerns about Beverly's health; the death of Beverly's husband; and Beverly's request that J.S. be returned to her custody.

A hearing on the motion to modify was held on November 20, 2009. The juvenile court (Judge Carol S. Egly) first rejected the father's claim that the matter was res judicata. The court then stated:

I would find that there has been major change of circumstances here since the ruling by Judge Fultz.

A huge one is the original dispositional order placed the child in the custody of Beverly and Harley . . . and clearly Harley is no longer here. That is a huge change in circumstances. There were two people that were guardians of this child, custodians of the child, and now there is only one. . . . [I]t's undisputed for at least two weeks from the time the order was entered, she was unable to take custody. I do find that about the 16th of October she was ready to assume custody and for whatever reason that did not happen. . . .

I'm finding that additional huge change of circumstance is the child's mother has since completed inpatient treatment . . . and the child's mother is now back in the community, as the evidence apparently shows. When I read the transcript, which I did read, of Judge Fultz's order and the hearing evidence before that, it was clear and I will judicially note that the department's position regarding home studies for relatives was just announced right

about that time But it was not at all clear on October 1st that every relative would have to have a thorough home study and that that could upset a preadoptive placement.

Judge Fultz made the findings that her concurrent plan was Beverly [], and that is in doubt whether that could be at this point. It's not that it's unlikely. It sounds as if it's still possible. But if there is a doubt whether she could be the concurrent plan, that's a huge change in circumstances, and to order this child when we are within less than two months to establishing permanency and her mother is back in the community, to change from one home to another is not in the child's best interests.

The court also noted that the mother's treatment plan was currently different than had been presented to the court earlier. The court thus found that it was in the best interests of the child to remain in the custody of DHS for purposes of foster care.

The father now appeals, contending the issue of modification was res judicata. In the alternative, he argues the modification was not sustained by sufficient evidence and was not in the child's best interests.

II. SCOPE AND STANDARDS OF REVIEW.

Our scope of review in CINA proceedings is de novo. *In re K.B.*, 753 N.W.2d 14, 15 (Iowa 2008). We give weight to the juvenile court's findings of fact, but we are not bound by them. *In re K.N.*, 625 N.W.2d 731, 733 (Iowa 2001). Our overriding concern is the best interests of the children. *In re E.H. III*, 578 N.W.2d 243, 248 (Iowa 1998).

III. MERITS.

Iowa Code section 232.103 (2009) provides for modification of a dispositional order prior to its expiration. We have held a party seeking a modification of the custody provisions of a prior dispositional order must show the circumstances have so materially and substantially changed that the best

interests of the child requires such a change in custody. See *In re D.G.*, 704 N.W.2d 454, 458 (Iowa Ct. App. 2005).

The juvenile court correctly overruled the father's argument that the principles of res judicata prohibited a new application for modification of J.S.'s placement. As one court has stated,

[R]es judicata extends only to the facts and conditions as they existed at the time of the first judgment and does not bar the fresh litigation of an issue which is appropriately subject to periodic redetermination, as subsequent facts and changed conditions may alter the status of the thing being evaluated.

Scott v. Prince Georges County Dept. of Social Servs., 545 A.2d 81, 90 (Md. 1987) (citation omitted). Statutorily, a CINA dispositional order is reviewable. Iowa Code § 232.103. Because circumstances had changed that affected the child's best interests, the doctrine of res judicata was not applicable

Upon our de novo review of the evidence presented at the hearing on the second motion to modify disposition, we agree with the juvenile court there were material and substantial changes of circumstances that warrant a modification of the dispositional order: the death of Beverly's husband, the mother's new plan for out-patient treatment, the DHS policy requiring a home study for relative placement. We agree, too, with the juvenile court that "to move this child when decisions are going to be made that will be long term and require more moves" would not be in J.S.'s best interests. We therefore affirm.

AFFIRMED.