

IN THE COURT OF APPEALS OF IOWA

No. 0-609 / 10-1100
Filed September 22, 2010

**IN THE INTEREST OF D.C.,
Minor Child,**

**D.N., Father,
Appellant.**

Appeal from the Iowa District Court for Warren County, Kevin A. Parker,
District Associate Judge.

A father appeals from a dispositional order in a child in need of assistance
proceeding. **REVERSED.**

Jami J. Hagemeyer of Williams, Blackburn & Maharry, P.L.C., Des Moines,
for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney
General, Bryan Tingle, County Attorney, and Karla Fultz, Assistant County
Attorney, for appellee.

Kathleen Sandre, West Des Moines, for mother.

Paul White, Des Moines, attorney and guardian ad litem for minor child.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ.

EISENHAUER, J.

A father appeals from a dispositional order in a child in need of assistance (CINA) proceeding. He contends there is not clear and convincing evidence to establish a substantial change of material circumstances to justify modification of the child's placement with him. We review his claim de novo. *In re B.B.*, 598 N.W.2d 312, 315 (Iowa Ct. App. 1999).

The background of this case was summarized in *In re D.C.*, No. 09-1545 (Iowa Ct. App. Jan. 22, 2010):

The child, born in July 2008, was voluntarily removed from the mother's care in January 2009 after concerns about the mother's self-harming behaviors and her frustrations with parenting. The child was placed in the care of the maternal grandparents and was adjudicated in need of assistance pursuant to Iowa Code sections 232.2(6)(b), (c)(2), and (n) (2009). In February of 2009, the father's name was provided to the Department of Human Services and he was made aware of the juvenile court proceedings. On April 8, 2009, the father filed a motion seeking custody of the child. The mother and father's relationship ended before the child was born and the father had not previously had any contact with the child. The parents were never married.

In June 2009, the court held a hearing on the maternal grandparents' motion to intervene in the proceedings. It also took evidence regarding the father's motion to have the child placed in his care. At the close of the hearing, the court ordered the child remain in the maternal grandparents' care until the dispositional hearing, which was held in September 2009. After the disposition hearing, the court ordered the child to remain in the care of the maternal grandparents.

The father appealed from the dispositional order, seeking custody of the child. *In re D.C.*, No. 09-1545. This court reversed the juvenile court, concluding the child's best interest was served by placing the child in the father's care. *Id.* The child was placed in his father's care on January 22, 2010. Until May 5, 2010, the

child lived with his father. They lived in a house in Des Moines with the paternal grandparents.

In May 2010, the guardian ad litem moved for modification of the child's placement, alleging the home was a danger to the child's health and safety, and the child had suffered a number of injuries while in the father's care. Without holding a hearing on the matter, the juvenile court immediately ordered the child placed with the maternal grandparents. In June 2010, a review hearing was held and the guardian ad litem's motion to modify was considered. The juvenile court modified the dispositional order to place the child with the maternal grandparents.¹

Modification of custody requires a material and substantial change of circumstances. *In re J.F.*, 386 N.W.2d 149, 152 (Iowa Ct. App. 1986). The child's best interest is the determining factor in making decisions regarding the child's placement. *Zvorak v. Beireis*, 519 N.W.2d 87, 89 (Iowa 1994). The burden is on the party seeking modification. *In re D.G.*, 704 N.W.2d 454, 458 (Iowa Ct. App. 2005).

¹ Although the procedural posture of this case is unusual, we are reviewing the modification of the order placing the child in the care of his maternal grandparents. The State argues the May 2010 order removing the child from the father's care and placing him with the maternal grandparents places the burden on the father to prove the child can be returned to him without suffering some further adjudicatory harm. In its June 2010 order, the juvenile court does state the "burden of proof for a return of custody is upon the child's parent by a preponderance of the evidence that the child will no longer suffer adjudicatory harm." However, at the June 2010 hearing the court considered evidence of a change of circumstance since the February 2010 dispositional order. Furthermore, the decretal portion of the June 2010 order states, "The dispositional order of February 18, 2010 is hereby modified" and "[c]ustody of [the child] is hereby placed with his maternal grandparents"

The father contends there is a lack of clear and convincing evidence of a substantial change in material circumstances to justify the modification of the child's placement. In finding a substantial change of circumstances warranted modification, the juvenile court noted the following: (1) an incident on May 1, 2010, in which the child's paternal uncle came to the home and threatened to stab the paternal grandfather, (2) the cleanliness of the home, (3) anger and frustration the father has exhibited over visitation, and (4) injuries the child has received while in the father's care. We address each of these in turn.

The guardian ad litem's petition to modify alleged the police had been called to the father's residence on several occasions. Since May 2009, the police have been called to the father's residence on six separate occasions. Four of these instances occurred prior to the September 2009 disposition and involve incidents that pose no danger to the child, such as a dispute with children at a neighboring church and a theft. In December 2009, police were called after a neighbor's purse was found. And in May 2010, police were called after the paternal uncle came to the house in an intoxicated state and threatened to stab the paternal grandfather. With regard to the May 2010 incident, the evidence indicates the father was at work at the time. There is no evidence the child was present in the home or was ever placed in harm's way. The paternal uncle does not live in the home with the child and has not lived there since the child has stayed in the home. This isolated incident is not sufficient to warrant a change of custody.

In its June 2010 order, the juvenile court notes the following concern at paragraph fifteen: “The environment of [the father]’s home has deteriorated. The kitchen is not sanitary: dirty dishes, dirty clothes, soiled diapers, animal feces on the floor, leftover food on the stove, and numerous flies.” Evidence of the condition of the home was received through the testimony of the DHS worker. The worker described her concerns about the condition of the home in the months leading up to removal as an increase in odor and clutter and the presence of “several” flies in the kitchen. Although there was speculation as to possible dangerous conditions that “could” have existed in the home, the worker did not testify with any certainty as to the existence of these possible safety concerns. In fact, the worker initially did not believe the condition of the home warranted removal and did not change her mind until after a staffing with her supervisor, in which the May 1, 2010 call to police was discussed. The worker further testified the concerns about the cleanliness of the home have been “an ongoing concern” since the case started in January 2009. The condition of the home is not a substantial change of circumstance warranting the removal of the child.

The court also cited “anger and frustration” exhibited by the father. This refers to an incident in which the father became frustrated regarding a lack of visitation with his son and allegedly used profanity and hung up on the worker who was arranging the visits. This incident occurred after the child was returned to his grandparents in May. The DHS worker testified the father had never lost his temper or became verbally abusive with her. In her report, the worker

acknowledged the father's frustrations but commended him on his flexibility with regard to visitation.

Finally, the order notes,

Since [the child] has been in his father's care, he has had a black eye, rashes and head lice. DHS worker Brown has had [the child] put his arms out to her when she left the father's home, indicating that [the child] wanted to leave with Brown.

The record reveals the child had head lice on one occasion. The worker testified the child had a black eye on one occasion as well as rashes and bruises. She was unable to state how many injuries the child received over a particular time period. She was satisfied with the father's explanation as to how the injuries occurred and did not ask for a child protective assessment to be performed. At the time these injuries occurred, she was satisfied with the father's explanation as to how the injuries were received.

Upon our de novo review of the record, we are unable to find a substantial change of circumstances has occurred since the February 2010 dispositional order, which transferred custody of the child to the father. As the worker testified:

My recommendation in the case plan really has to do mostly with his lack of insight, lack of follow through on the home, lack of ability to maintain a home. It really doesn't have a whole lot to do with what he has or hasn't done in terms of parenting classes or substance abuse treatment. Those weren't even identified as concerns.

The concerns with the home were not so great the worker felt the child's safety was an issue immediately following an unannounced home visit on May 4, 2010. There are no concerns about the father abusing the child and, in fact, the father continued unsupervised visitation with the child after return to the maternal

grandparents' home. On the record before us, we find the child's best interest is not served by a change in custody. Accordingly, we reverse the district court's June 2010 order, which transferred custody of the child to the maternal grandparents.

REVERSED.