

IN THE COURT OF APPEALS OF IOWA

No. 0-835 / 10-1215
Filed November 24, 2010

**IN THE INTEREST OF M.B. Jr. and L.W.,
Minor Children,**

K.B., Mother,
Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Gary K. Anderson, District Associate Judge.

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

AFFIRMED.

Eric J. Nelson, Council Bluffs, for appellant mother.

C. Kenneth Whitacre, Glenwood, for father of M.B. Jr.

Marti D. Nerenstone, Council Bluffs, for father of L.W.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, Matthew Wilber, County Attorney, and Dawn Landon, Assistant County Attorney, for appellee State.

Phil Caniglia, Council Bluffs, for minor children.

Considered by Eisenhauer, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

A mother appeals from the juvenile court's order modifying a dispositional order in this child-in-need-of-assistance (CINA) proceeding. She contends the juvenile court did not have the authority to modify the order. Additionally, she argues the court erred in modifying the order to remove her children from her care. We affirm.

I. Background Facts and Proceedings.

K.B. is the mother of L.W., born October 2003, and M.B. Jr., born September 2007. L.W.'s father is S.F.,¹ and M.B. Jr.'s father is M.B.² L.W. is a victim of sexual abuse perpetrated by an older peer, and she has been diagnosed with an adjustment disorder with anxiety and depression. The children lived with the mother and M.B. (parents), who initially lived in Council Bluffs, Iowa.

The children came to the attention of the Iowa Department of Human Services (Department) in September 2008 when it was reported that the parents were using illegal drugs. The mother admitted she and M.B. had used methamphetamine and that she also sold drugs to financially survive. The juvenile court found the children should be temporarily removed from the parents' care, and it ordered services be provided to the parents. The court directed the parents to fully and timely cooperate with all counseling, treatment, and services

¹ S.F. resides in Texas. At the beginning of this case, S.F. was in the military, serving in Iraq. He reported he was unaware he was L.W.'s father until 2005, and then he was unable to keep in contact with the mother due to the mother's frequent moves. He was introduced to L.W. during the pendency of this case.

² M.B. does not appeal from the juvenile court's order modifying the dispositional order to remove the children from his and the mother's care and custody.

provided. The court also directed the parents to abstain from all mood-altering substances, including alcohol, and to obtain psychological evaluations.

Thereafter, the parents made progress with services, and the children were returned to the parents' custody on December 10, 2008. On December 16, the juvenile court adjudicated the children CINA, and the court agreed the children should be returned to the parents' care pending disposition. The court directed the parents to submit to mental health evaluations, and it ordered that all of the provisions of its temporary removal order remain in full force and effect.

Following a dispositional hearing in January 2009, the juvenile court entered its dispositional order noting the parents had continued to participate in services and the Department had no concerns at that time. The court's order continued services for the family and directed the mother to continue counseling, meeting with the family support worker, and submitting to random drug screens.

Beginning in March 2009, the parents' progress declined. There was a domestic abuse incident between the parents, resulting in a founded Department report of denial of critical care and failure to provide adequate supervision, naming M.B. as the perpetrator. The parents both had missed or diluted drug screens, and M.B. tested positive for methamphetamine. In June 2009, the juvenile court entered a review modification order, noting relationship problems had arisen between the parents that had led to the mother, along with the children, leaving the family home. The court also found M.B. had "shut down" from services and was missing appointments with service providers. The court allowed the children to remain in the parents' care and custody, but again directed the parents to continue participating in its previously-ordered services,

as well as directing the mother to continue addressing her personal emotional health issues.

In July 2009, M.B. again tested positive for methamphetamine. Thereafter, the Department's caseworker filed an application for a temporary removal order. The worker stated in the application that the mother continued to offer excuses and explanations for M.B.'s behavior and was unable to separate her emotional attachment to M.B. from her children's safety. The worker further stated that the mother's therapist had indicated the mother felt the case expectations were very difficult for her and that she and the family needed to relocate by the end of the month because they were being evicted. The worker opined that the parents posed a flight risk and requested the children be removed from the parents' care and custody. The court granted the application for temporary removal, and the children were placed with their maternal grandmother. The court directed the parents to continue to participate in its ordered services.

In November 2009, the parents moved to Plattsmouth, Nebraska, after securing a residence there. The mother obtained employment, working the overnight shift. In December 2009, it was noted that L.W. was experiencing high anxiety and nervousness, and it was recommended that L.W. continue therapy, with the parents attending one session a month. In January 2010, after a home study was performed, the Nebraska Department of Health and Human services, via the Interstate Compact on the Placement of Children, recommended the children be placed with the parents on a probationary basis.

Following a review hearing in April 2010, the juvenile court agreed the children should be returned to the parents' care, finding the parents had secured a home and employment and the father was participating in services through the State of Iowa and the State of Nebraska. The court directed, among other things, that the mother attend a minimum of two community support meetings per week and provide written documentation of attending to the Department. The court also directed the mother to continue to meet with the in-home provider, to make arrangements for and insure L.W. attended individual play therapy a minimum of four times per month, and to maintain a suitable residence.

In July 2010, the State filed a motion stating that "many things have changed since the review in May that need to be addressed quickly." The State noted the court's previous orders concerning detailed services for the parents and advised the court that the family was not receiving any services from the State of Iowa due to the family living in Nebraska. The State requested a hearing "to resolve these risk issues," and the juvenile court subsequently entered an order granting the motion and setting a hearing. Copies of the motion and order were provided to the parties.

A hearing was then held on July 9, 2010. The Department's caseworker testified that the parents had moved again due to financial difficulties, and again only informed the Department of the move after the fact. The worker testified that law enforcement had been called to the family's home. The worker reported that L.W. had missed two scheduled sessions with L.W.'s counselor, but testified the mother had indicated L.W. was seeing a school counselor. However, the worker opined there was no imminent danger to the children. The worker

reported the mother's drug screens continued to come back negative, but the mother was not complying with other services ordered by the court due to the move and financial issues. The worker testified she had tried getting services for the mother in Nebraska but had been unsuccessful. The worker did not make a specific case recommendation but requested the court's guidance on how to proceed in the case.

After hearing the Department caseworker's testimony and statements of counsel, the court stated:

I guess we've been through a lot of hearings in this case and heard a lot of testimony. The court's entered a lot of orders and no one seems to want to follow those orders.

I recognize that . . . the parents don't have a lot of money, but they've made the choice to live in . . . Nebraska. We attempted to put the children back with them through interstate compact, [and] that hasn't worked.

Once again, it's the parents' choice where they want to live. However, when I have children involved in the court in the State of Iowa, I can provide services to children in the State of Iowa. And . . . when the children go out of the State of Iowa, then I have to rely on other states. In this instance, relying on the State of Nebraska has been a mistake.

It seems to me that I'm the only one that's concerned that these parents aren't complying with the court orders. [There are] plenty of services that they could have done on their own for free. AA, NA are clearly free. They're clearly available in Plattsmouth, Nebraska.

. . . . None of these orders are really all that new, and these parents consistently, once they get something, they revert back. They're not doing what I tell [them] to do and I guess I'm the only one that's upset about that.

Maybe there's not imminent risk; however, when people don't do what I ask them to do, I get upset. We don't order these services because we can. We order them because the children need them. And the parents need to do what I tell them to do.

It seems to me that we need a whole new direction in this case. We've tried the children at home [and] back with the parents. It has not worked.

[The parents] haven't done what I've asked [them]. [They] stonewall the [Department] and our hands are tied when the

children are in the State of Nebraska. I'm going to order that the care, custody, and control of [L.W.] be placed with [the father, S.F.]. . . . I'm going to place [M.B. Jr.] back with [the] maternal grandmother, . . . so that the children can get the services they need.

The next day, the juvenile court entered its "CINA Review Modification Order" in accordance with its ruling at the hearing. The court's order stated:

The court would note that [the parents] chose not to move to Council Bluffs or the State of Iowa, which would be significantly closer to [M.B.'s] employment . . . in Council Bluffs, but chose to live, again, in Plattsmouth, Nebraska, a considerable distance from the Council Bluffs area, which only continues the transportation problems [the parents] have experienced. It would seem to the court that if they had any desire to participate in services, they would move back to the State of Iowa and the court could have provided those services at court expense . . . , they could have received the services, lived closer to [M.B.'s] work and complied with the court order. They failed to make that choice. The court would also note that they were ordered to attend AA or NA meetings, which the court is fully aware could have been provided to them in Plattsmouth, Nebraska, at no cost to them. Their claim of poverty and lack of transportation is without merit. The court can only conclude that they do not wish to participate in services which the court has ordered and feels are required in order for the children to remain in their care, and as such, the court finds that a new direction in this matter needs to be followed by the court.

The mother appeals.

II. Scope and Standards of Review.

Our review of CINA proceedings is de novo. *In re K.B.*, 753 N.W.2d 14, 15 (Iowa 2008). Although we give weight to the juvenile court's factual findings, we are not bound by them. *In re K.N.*, 625 N.W.2d 731, 733 (Iowa 2001). Our fundamental concern is the best interests of the children. *Id.*

III. Discussion.

A. Authority.

The mother first contends the juvenile court did not have the authority to modify “custody upon a request for a review hearing by the State and the Department.” The mother asserts this issue was preserved by her counsel notifying the court she was opposed to a modification of custody. The State argues this notification was not sufficient to preserve the issue of the court’s authority.

We tend to agree with the State, as the mother did not specifically challenge the juvenile court’s authority to enter the order, as claimed here. See *State v. Eames*, 565 N.W.2d 323, 326 (Iowa 1997) (noting “[o]ur error preservation rule ‘requires that issues must be presented to and passed upon by the district court before they can be raised and decided on appeal.’”); *State v. Farni*, 325 N.W.2d 107, 109 (Iowa 1982) (“We do not review issues, even on constitutional grounds, which are raised for the first time on appeal.”). Nevertheless, we need not rely on error preservation to dispose of the issue she raises because we conclude, on the merits, that the juvenile court acted properly within its authority.

Iowa Code section 232.102(1) (2009) provides the juvenile court may enter an order transferring the legal custody of the child after a dispositional hearing. *Id.*; see Iowa Code § 232.102(2). After the dispositional order is entered, the court must

hold a periodic dispositional review hearing for each child in placement pursuant to this section in order to determine whether the child should be returned home, an extension of the placement

should be made, a permanency hearing should be held, or a termination of the parent-child relationship proceeding should be instituted.

Id. § 232.102(9). The Iowa Supreme court has

construed this provision of the Code narrowly as authorizing only three specific actions for the juvenile court to take at a review hearing: return the child to her home, extend the current placement, or commence termination proceedings. A juvenile court is not authorized to change custody at a *review hearing*.

K.B., 753 N.W.2d at 16 (internal citations omitted) (emphasis added).

Section 232.103 allows the court to terminate, modify, or vacate a previous dispositional order prior to its expiration on its own motion. Iowa Code § 232.103(1). However, “reasonable notice of the hearing” to the parties is required. *See id.* § 232.103(3).

Upon our review, we conclude the juvenile court acted properly within its authority under section 232.103(1), and we find *K.B.* to be distinguishable. Here, the State filed its motion noting its concerns and potential “risk issues” due to the parents’ move and lack of participation in court-ordered services, of which the parties received notice. The court then set the matter for hearing. This was not a previously scheduled review hearing, as in *K.B.* *See K.B.*, 753 N.W.2d at 16. Notice of the newly scheduled hearing was provided to the parties. The mother appeared at the hearing with counsel and did not challenge the short notice or request a continuance or otherwise object to the scope of the hearing. Unlike in *K.B.*, the language of the State’s motion and certainly the court’s order setting the hearing sufficiently alerted the parties that modification of the dispositional order was a possibility. *See id.* at 17 (finding the mother in *K.B.* was unaware of the State’s position that the court was going to consider a change of *K.B.*’s custody

at the hearing). Following the hearing, the court then modified its previous dispositional order, changing the custody of the children. We conclude the juvenile court acted properly within its authority and find the mother's claim to be without merit.

B. Modification of the Dispositional Order.

The mother also contends the juvenile court erred in modifying the prior order, arguing the court had insufficient grounds to remove the children from the mother's custody. The mother again cites Iowa Code section 232.102, asserting that section required the court to find, by clear and convincing evidence, that the children could not be protected from either physical abuse without transfer of custody or some harm that would justify the adjudication of the children as CINA. See *id.* §§ 232.102(1)-(2). However, we have concluded the juvenile court's order was a modification of a previous dispositional order pursuant to section 232.103(1). 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).

Upon our de novo review of the record, we conclude a substantial and material change of circumstances occurred here to warrant modification of custody in the children's best interests. The juvenile court set forth explicit directions, based upon recommendations of the Department and service providers, that the parents participate in services it deemed necessary for total reunification with the children and in the best interests of the children. When the court placed the children back in the parents' custody, the parents were

participating in services. At the time of the July modification hearing, they were not. Given the parents' past substance abuse issues and L.W.'s psychological needs, among other things, we find the parents' recent lack of participation in court-ordered services justify a modification of the dispositional order. Accordingly, we affirm the order of the juvenile court.

IV. Conclusion.

We conclude the juvenile court acted properly within its authority under section 232.103(1) in modifying the previous dispositional order. Additionally, we find the parents' recent lack of participation in court-ordered services constituted a substantial and material change of circumstances warranting modification of custody in the children's best interests. Accordingly, we affirm the court's order modifying the previous dispositional order.

AFFIRMED.