

IN THE COURT OF APPEALS OF IOWA

No. 0-971 / 10-1865
Filed February 9, 2011

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

**M.E., Father,
Appellant,**

**J.E., Mother and STATE OF IOWA,
Appellees.**

Appeal from the Iowa District Court for Pocahontas County, Kurt J. Stoebe, District Associate Judge.

A father appeals from a dispositional review order that continued the child in need of assistance proceedings regarding his son. **AFFIRMED.**

William D. Thomas of Shors & Thomas, Pocahontas, for appellant father.

Carol A. Hallman of Hudson Law Firm, Pocahontas, for appellee mother.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, and Ann Beneke, County Attorney, for appellee State.

Donald Beneke of Beneke Law Office, Pocahontas, attorney and guardian ad litem for minor child.

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

POTTERFIELD, J.**I. Background Facts and Proceedings.**

S.E. is the child of Joy and Michael, who were divorced in 2000. The dissolution decree placed S.E. in Michael's physical care. S.E. came to the attention of the Department of Human Services (DHS) and the court during the 2006–07 school year due to truancy and underlying physical and mental problems.

On January 4, 2008, S.E. was adjudicated a child in need of assistance under Iowa Code section 232.2(6)(c)(1) (child who has suffered or is imminently likely to suffer harmful effects as a result of the mental injury caused by the acts of parent, guardian, or custodian), (c)(2) (child who has suffered or is imminently likely to suffer harmful effects as a result of the failure of parent to exercise a reasonable degree of care in supervising him), and (f) (child who is in need of treatment to cure or alleviate serious mental illness or disorder or emotion damage as evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others and whose parent is unwilling to provide such treatment). Because S.E. had recently shown improved attendance the juvenile court continued the dispositional hearing indefinitely.

On July 11, 2008, the court entered an order noting S.E. had been residing with Joy in Nebraska since June 20 and “the placement appears to be successful and the child is enrolled in summer school,” which was to begin later that month.

On November 14, a review hearing was held. The court noted “significant improvement.” The court stated S.E. “has progressed well”; “is attending school

regularly and is receiving excellent grades”; and is participating in extracurricular activities. The court requested assistance from Nebraska DHS and also granted concurrent jurisdiction to the Iowa District Court for purposes of determining permanent custody. The district court denied Joy’s request to modify the dissolution decree and place custody of S.E. with her.

On April 3, 2009, Michael asked that the CINA case be closed immediately, or in the alternative that S.E. be returned to his care. Joy asked that the case remain open and S.E. remain in her care so she could pursue a modification action in Nebraska courts.

In a July 2009 order, the juvenile court observed the use of the CINA action as a means of staying the district court’s action was not appropriate.

This court believed that it had found a good placement for the child. However, it is not a permanent placement and the District Court has established the permanent placement. So, the Court must re-initiate reasonable efforts to attempt to reunify the child with the child’s father. In short, [the district court’s] decision is now the law of this case. The efforts made prior to June, 2008, to reunify the child with the child’s father were unsuccessful. Nevertheless, the child is now a year older and by all accounts has matured. The child is now attending school and does not have the physical or emotional problems that were exhibited prior to June, 2008. We must determine whether those problems will resurface and truancy will again be a problem. If so, then there may be new evidence that can be presented to the District Court for a re-examination of the custody issue. Until then, reasonable efforts must be made to reunify with the custodial parent

The juvenile court found termination of the case was not in the best interest of S.E. “because there has not been a successful placement of the child with the father since this case has been pending.” The court therefore denied Michael’s motion to dismiss, but placed custody of S.E. with Michael under DHS supervision.

On September 22, 2009, Joy filed a motion to modify the dispositional order as S.E. was again missing many days of school. Joy asked that S.E. be placed in her custody. At the hearing on the motion, evidence showed S.E. had fourteen absences from school and that a student loses credit for the semester if he has ten absences. The court found that Michael had used his best efforts to have S.E. attend school, but those efforts were unsuccessful. The court found clear and convincing evidence the CINA adjudication should be continued, ordered custody of S.E. transferred to Joy, and indicated it would order transfer of the case through interstate compact to Nebraska.

A review hearing was held on November 5, 2010. At the hearing, it was noted that S.E. was doing well in his mother's custody; he attended school regularly and was achieving excellent grades. S.E., now fifteen years old, requested that he be allowed to live with his father because his father "has medical problems now and I'd like to be there for him." He also stated his previous desire to live with Joy was due to his wanting to live near a now-former girlfriend. S.E. assured the court that he planned to attend school regularly if he lived with his father and had his own transportation to get to school. When asked what was different now, S.E. stated, "I'm matured, I'm older, matured, I just got out of a relationship." He acknowledged Michael had kept him out of school to drive Michael to a doctor's appointment within the past four weeks.

Joy stated to the court there were days S.E. wakes up and says he does not feel well and

we have to force him to go to school. He'll go and he's fine once he gets there, but there are several days that he tries to stay home. I believe if he's left on his own accord, at his choice to go, he won't[.]

She also expressed concern that S.E. would forget to take his medicine if he returned to Michael's: "he's still a lot of times has to be reminded to take his medication to help him stay healthy."

The court ruled from the bench it would not terminate the CINA proceedings or move S.E. from Joy's custody. In its written ruling the court noted the repeated placements with Michael were unsuccessful and the issues of absences from school and health problems did not arise in Joy's custody. The court found,

It is not the child's responsibility to care for his father. The added stress of this task, in addition to the long record of failed placement while in the father's care, dictates this court's continued jurisdiction and adjudication of the child as a child in need of assistance.

The court ruled custody was to remain with Joy under the supervision of DHS.

Michael now appeals the court's ruling continuing the finding that S.E. is a child in need of assistance.

II. Scope of Review.

Our review of CINA proceedings is *de novo*. *In re K.N.*, 625 N.W.2d 731, 733 (Iowa 2001). We give weight to the juvenile court's factual findings, but we are not bound by them. *Id.* Our primary concern is the best interests of the child. *Id.*

III. Dispositional Order.

Iowa Code section 232.103(4) (2009) provides:

The court may modify a dispositional order, vacate and substitute a dispositional order, or terminate a dispositional order and release the child *if* the court finds that any of the following circumstances exist:

a. The purposes of the order have been accomplished *and* the child is no longer in need of supervision, care, or treatment.

.....
d. The purposes of the order have been sufficiently accomplished *and* the continuation of supervision, care, or treatment is unjustified or unwarranted.

(Emphasis added.) As noted in *K.N.*, 625 N.W.2d at 733, in order to terminate a dispositional order, the statutory sections require both a finding by the court that the purposes of the dispositional order have been accomplished *and* (under subsection 4(a)) the child is no longer in need of supervision, or (under 4(d)) continued supervision is unjustified.

Upon our de novo review, we agree with the district court that it would not be in the best interest of S.E. to terminate the CINA proceedings. The purposes of the dispositional order were to ensure adequate supervision for S.E., which in turn ensured he attended school and received proper medical care. While in Joy's care, those purposes have been accomplished. But that alone is not sufficient to terminate the dispositional order. See *id.* (finding it was error to terminate dispositional order where purposes had not been accomplished and the child remained "at risk").

History informs us that S.E. needs supervision to make sure he attends school and takes his medication. That supervision is lacking when S.E. is in Michael's care because of Michael's work schedule. We commend S.E. for his progress at school. We also recognize his stated preference to live with and assist his father. *In re A.T.*, 744 N.W.2d 657, 663 (Iowa Ct. App. 2007) (noting "a child's wishes deserve serious consideration"). But Michael has been unable to ensure S.E. attends school in the past. See *In re T.B.*, 604 N.W.2d 660, 662

(Iowa 2000) (noting the “future can be gleaned from evidence of the parent’s past performance and motivations”). And we are not convinced that S.E. will follow through with his stated intention to attend school if he returns to Michael’s care: his mother states he often must be encouraged to do so. We find that S.E. remains in need of supervision to accomplish the purposes of the dispositional order. We therefore affirm the court’s order.

AFFIRMED.