

IN THE COURT OF APPEALS OF IOWA

No. 1-129 / 10-1761
Filed March 21, 2011

**IN THE INTEREST OF Z.F.,
Minor Child,**

**R.L.M., Mother,
Appellant.**

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

A mother appeals from the CINA dispositional order of the juvenile court.

AFFIRMED.

Nathaniel A. Tagtow of Nelissen & Juckette, P.C., Des Moines, for
appellant mother.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney
General, John Criswell, County Attorney, and Karla Fultz, Assistant County
Attorney, for appellee State.

John C. Heinicke of Kragnes & Associates, P.C., Des Moines, attorney
and guardian ad litem for minor child.

Considered by Sackett, C.J., and Potterfield and Mansfield, JJ.

POTTERFIELD, J.

A mother appeals from the child in need of assistance (CINA) dispositional order of the juvenile court. She argues the juvenile court should have ordered custody transferred to her parents rather than to the Department of Human Services (DHS) after the stipulated adjudication that the child is a CINA. Upon our de novo review, we find the transfer of legal custody was appropriate and therefore affirm.

I. Background Facts and Proceedings.

The mother, Rose, has three children, including Z.F. who was born in July 2010. Her two older children are now being raised by her parents, James and Phyllis: the son is under a guardianship to the grandparents; the daughter lives with her father but is in more or less full-time daycare with the grandparents. Rose appeals the court's decision to place the youngest child in foster care rather than with James and Phyllis. James and Phyllis are long-time foster parents, who are 80 and 75 years old respectively.

Rose has been diagnosed with mental retardation and receives social security disability benefits for her intellectual disability. She has no stable housing, although she stays in a camper on her parents' property. DHS previously had been involved with Rose as a result of child endangerment charges concerning the two older children.¹

¹ In 2009, Rose threw her four-week-old daughter and pushed her son who was in a high chair. She was found guilty of two counts of child endangerment. DHS offered services, but Rose's parents instead established a guardianship for Rose's daughter and eighteen-month-old son. Rose's daughter was later placed with the child's father, but the grandparents continue as guardians of the son and full-time daycare providers of the daughter.

At the end of July 2010—nine weeks prematurely—Rose gave birth to Z.F., in the trailer of a known drug user. Paramedics arrived just before the birth and Z.F. was treated in a neonatal intensive care unit (NICU) for several weeks.

On August 5, 2010, CINA assessment worker, Desiree Leblanc, telephoned Rose and Rose's mother, Phyllis, about Z.F. and the CINA assessment. Phyllis reported the circumstances of Z.F.'s birth and his current whereabouts. Phyllis also stated she and her husband did not want to raise another baby and that other plans had been made. Z.F. was going to be placed with a family friend, Crystal G., under a guardianship.

Ms. Leblanc went to the NICU and met with Rose, who did sign an application for services so the CINA assessment could be completed. While Ms. Leblanc was speaking with Rose, Crystal arrived "smell[ing] strongly of alcohol." Ms. Leblanc reports Crystal "discussed her thoughts on parenting which included a story about duct taping [her son] into a corner when he was a child because he was hyperactive." A background check revealed Crystal had deferred judgments on two 2009 drug charges and a 2010 conviction for cruelty to animals.

On August 6, 2010, the State filed an application for temporary removal, asserting Rose was unable to safely parent the infant as she was allowing persons under the influence of alcohol in the NICU room with the child. An ex parte temporary removal order was filed that same date. Based upon findings of the mother's history of unsafe parenting, mental retardation, and poor judgment; no paternity having been established; and that placement with "another relative is not available," temporary custody was transferred to family foster care under DHS supervision. Z.F. remained in the NICU for several more weeks.

A CINA petition was filed on August 11. That same date a removal hearing was held and the removal confirmed. A pre-adjudication hearing was scheduled for early September and paternity testing was ordered.²

On August 25, 2010, Phyllis contacted Ms. Leblanc, upset that Z.F. was being placed in foster care. Phyllis indicated that she and James could care for Z.F. She also stated she did not understand why the child was removed from Rose if he did not have drugs in his system and denied that Rose associated with drug users. In Ms. Leblanc's CINA assessment summary she indicates "Rose has expressed little interest in parenting [Z.F.] since the first visit at the hospital" and Rose has little insight into why DHS is involved and "has a strained relationship with her parents who frequently have to save her from the poor choices she has made." Ms. Leblanc noted Phyllis and James expressed they wanted to care for the child.

On October 1, 2010, a combined adjudication and dispositional hearing was held. The parties stipulated Z.F. was a CINA. Evidence was presented on the contested issue of disposition.

Ms. Leblanc testified she learned of the grandparents' request to care for Z.F. at the removal hearing. She stated the reasons DHS did not recommend placing Z.F. with the grandparents included the previous rejection of DHS services with respect to Rose's other children, the grandparents' age and current responsibilities for two toddlers; the concern that this case would require long-term placement; and concerns that the grandparents enable Rose to avoid her

² The father is unknown. Paternity testing to date has failed to establish the identity of the biological father.

parenting responsibilities and were not able to recognize that Rose associated with active drug users. Ms. Leblanc stated she believed Rose was then staying in a camper on the grandparents' property.

James testified he and Phyllis could care for and protect Z.F. He stated he was not aware that Crystal had recent drug history. He testified he was aware Rose associated with people that are not appropriate to be around children. He acknowledged that individuals Rose knows have come to the property under the influence of drugs and that "about three days ago" he had told someone to leave because he had been smoking marijuana.

Phyllis also testified at the hearing. She stated she was not aware Crystal used drugs in the past or that she had a criminal history. She opined she was able to care for a third child and could keep them all safe. She minimized the incident that led to Rose pleading guilty to child endangerment and stated the officer was untruthful. Phyllis stated Rose admitted she needed help with anger management. Phyllis acknowledged she knew Rose "hangs out with people who are drug users," but "[t]hey know and she knows that they are not allowed on the place again."

The court admitted several exhibits, including the DHS CINA assessment report, and the DHS case plan dated September 21, 2010. The case plan, prepared by DHS assigned worker Kelly Brown, recommended that Z.F. remain in the foster family's care. Ms. Brown wrote:

During conversations with Phyllis she stated she and James are confident that they can care for another newborn despite having one toddler full time and one toddler part time. Phyllis also told DHS that Crystal would be an appropriate caretaker for [Z.F.]
There is no doubt that James and Phyllis want to provide a

home for [Z.F.] or that they are well intentioned and loving grandparents, however it cannot be overlooked that they are 75 and 80 years old, provide primary care for two toddlers, and do not recognize persons who are active drug users.

Also of significant concern to this worker, is that they were supportive of Rose's choice to have Crystal adopt and raise [Z.F.] even though she has recent drug and cruelty to animals charges. This worker is aware that the home in which Rose gave birth is that of a friend who has a lengthy DHS history and would not be considered a safe individual for a child to be around, yet, that person was identified by James and Phyllis as someone who they trust. No other family members of Rose's has come forward at this time as being interested in having [Z.F.] placed with them.

On October 4, 2010, the juvenile court filed two orders. The first was an adjudication order in which the court made the following specific findings of fact:

[Rose] has previously placed a child of 4 weeks in danger by throwing her. She was charged with Child Endangerment related to this. In April 2009 DHS offered services in effort to help Rose reunite with her two children ages 1 month and 18 months. She chose to pursue a guardianship with relatives and not participate in DHS Case Management. Rose continues to deny that she did anything to place those children in danger. She gave birth to [Z.F.] on the floor in a known drug user's trailer. He was born prematurely and was hospitalized for six weeks after his birth. Rose has minimal parenting capabilities, she is mentally challenged and is on SSDI because of this. Rose has no stable housing. [Z.F.] is in need of a safe and stable home that can meet his basic needs. Parties agree to the adjudication.

The second order, the disposition order, referenced the "findings in the adjudication order entered this date." The court ordered the child remain in foster care under the supervision of the DHS and adopted all the recommendations noted in the Case Plan.

The mother now appeals.

II. Scope and Standard of Review.

Our review in child in need of assistance proceedings is de novo. *In re K.N.*, 625 N.W.2d 731, 733 (Iowa 2001). We give weight to the juvenile court's findings of fact, especially its credibility determinations; however, we are not bound by them. *Id.* Our overriding concern is the best interests of the child. *Id.*

III. Least Restrictive Disposition.

Rose contends the juvenile court erred in placing the child in a foster home, rather than with the grandparents. At the early stage of CINA disposition, Iowa Code section 232.99 requires the court to make "the least restrictive disposition appropriate considering all the circumstances." Iowa Code section 232.99(4) provides:

When the dispositional hearing is concluded the court shall make the least restrictive disposition appropriate considering all the circumstances of the case. The dispositions which may be entered under this division are listed in sections 232.100 to 232.102 in order from least to most restrictive.

Citing *In re N.M.*, 528 N.W.2d 94, 97 (Iowa 1995), Rose notes that placement with relatives is considered less restrictive than placement with DHS. Our supreme court has stated that "[t]he home of a relative is considered less restrictive than placement in a private agency, facility or institution or placement with the department of human services. Thus, chapter 232 favors relative placements over nonrelative placements." *In re N.M.*, 528 N.W.2d 94, 97 (Iowa 1995) (citations omitted); see Iowa Code § 232.102(1) (noting transfer of custody to "parent who does not have physical care of child, other relative, or other suitable person" prior to "department of human services"). So, if a relative

placement is “appropriate considering all the circumstances,” such a placement should be selected as less restrictive than placement with DHS.

Rose also notes siblings should be kept together when possible. *But see In re T.J.O.*, 527 N.W.2d 417, 420 (Iowa Ct. App. 1994) (finding it was not in child’s best interests to establish a relationship with a sibling whom the child did not know and with whom the child had never resided).

Here, however, considering all the circumstances, we agree with the juvenile court that placement of Z.F. with the grandparents is not appropriate. The grandparents are already caring for two active toddlers.³ They share their home full-time with their grandson and forty-year-old son; they also have their granddaughter three nights a week. Rose—who has anger issues, intellectual challenges, and associates with known drug users—lives in a camper on the property. While we commend Phyllis and James for their efforts with their grandchildren already in their care, we agree with the observations of the workers involved that adding an infant into the equation would present a risk of harm or inadequate supervision. The overriding concern is the age of the grandparents, 75 and 80, in the context of the likelihood the placement would be long-term and, perhaps permanent.

After a careful review of the entire record we conclude placement of the child with the grandparents would be contrary to Z.F.’s welfare. Upon our de novo review of the dispositional hearing record, we find clear and convincing

³ James stated he lost fifty pounds running seven and a half hours a day after the two-year-old boy.

evidence that transfer of custody of Z.F. to DHS for placement in foster care is the least restrictive disposition appropriate considering all the circumstances.

IV. Written Dispositional Findings.

Rose also argues the juvenile court failed to include written findings of its reason for the disposition. Section 232.99 requires that the court “make and file written findings as to its reason for the disposition.” Iowa Code § 232.99(5). The State concedes the court’s dispositional order lacked supportive findings, but argues that this court’s de novo review allows for a determination of whether there is sufficient evidence to support the orders.

A court trying an issue of fact without a jury, whether by equitable or ordinary proceedings, must find the facts in writing, separately stating its conclusions of law, and direct an appropriate judgment. *In re A.M.H.*, 516 N.W.2d 867, 872 (Iowa 1994). Where juvenile orders do not contain written findings and statements as required by statute, procedural due process rights are implicated. *Id.* In *A.M.H.*, the court found Iowa Rule of Civil Procedure 1.904 (then numbered rule 179(b)) applicable to CINA proceedings because, “[a]n overlooked issue, called to the trial court’s attention, might be resolved so as to avoid an appeal.” *Id.* (citation omitted); see also *Johnson v. Kaster*, 637 N.W.2d 174, 182 (Iowa 2001) (noting the purpose of a rule 1.904 motion is “to advise counsel and the appellate court of the basis of the trial court’s decision in order that counsel may direct his attack upon specific adverse findings or rulings in the event of an appeal”). With the aims of the rule in mind, we do not believe the mother has been disadvantaged in her appeal. We have before us the entire record and transcript from the proceedings. The facts are not in dispute, and

although the court's form order should have included specific findings, we agree with the State the record is sufficient for us to determine the disposition ordered was appropriate.

Our de novo review of the case, as set out above, provides sufficient support for the disposition made. We therefore affirm the judgment of the juvenile court.

AFFIRMED.