

IN THE COURT OF APPEALS OF IOWA

No. 1-842 / 11-1405
Filed December 7, 2011

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

**C.S., Father,
Appellant,**

Appeal from the Iowa District Court for Clay County, Charles K. Borth,
District Associate Judge.

A father appeals from a dispositional review order returning the minor child
to the mother. **AFFIRMED.**

John P. Greer, Spencer, for appellant father.

Michael Johnson, Spirit Lake, for mother.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney
General, Michael J. Houchins, County Attorney, and Kristi Busse, Assistant
County Attorney, for State.

Shannon Sandy of Sandy Law Firm, P.C., Spirit Lake, for minor child.

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

DOYLE, J.

A father appeals from a dispositional review order returning the minor child to the mother. We affirm, based upon our de novo review of the record. See *In re K.B.*, 753 N.W.2d 14, 15 (Iowa 2008).

I. Background Facts and Proceedings.

The mother has a long history of substance abuse and involvement with the Iowa Department of Human Services. Her three oldest children were removed from her care in 2007 after it was determined two of them had been exposed to methamphetamine and cocaine. The mother entered an inpatient treatment program where she gave birth to the minor child at issue in this case, L.S. After the mother completed the program, L.S. and her older sister were allowed to stay in her care. The two oldest children remained in an out-of-home placement.

Unfortunately, the mother relapsed in March 2009. She placed L.S. with the father, and L.S.'s sister went to live with a maternal aunt. The mother's relapse was a violation of her probation for a drug-related offense. She was accordingly sentenced to a violator's program at the Women's Correctional Facility in Mitchellville. She completed the program and continued to voluntarily participate with services through the Department. Yet her drug problems persisted.

In May 2010, the Department asked the mother to submit to a hair stat test. She refused, eventually admitting she had used methamphetamine again. The mother entered an inpatient treatment program in July 2010 but left a little more than a week later. She was pregnant with her fifth child at the time.

Due to her mother's drug use, L.S. was adjudicated as a child in need of assistance (CINA) in August 2010 pursuant to Iowa Code sections 232.2(6)(b), (c)(2), (m), and (n) (2009). The juvenile court placed L.S. in the custody of her father, with whom she had been residing since 2009, under the Department's protective supervision. A subsequent dispositional order continued that placement.

A dispositional review hearing was held in August 2011, at which the mother sought the return of L.S. to her care. The mother had been sober for at least fifteen months. She was employed, had stable housing, and was cooperating with the services offered by the Department. Her youngest child had been in her care since her birth in early 2011. The caseworker who had worked with the family since the Department's initial involvement in 2007 nevertheless recommended L.S. remain in her father's custody, due to concerns about the "roller coaster ride that [the mother] has always been on." He testified, "The case plan highlight[s] since 2007 the numbers of incarcerations, treatment. In July of 2010 she walked out of inpatient treatment. . . . She never really fully cooperated." In contrast, according to the caseworker, the father "has raised [the child] most of her life. He provides excellent care for her." The child's guardian ad litem was more noncommittal, but testified, "I can't say that there would be a safety concern if in fact [L.S.] was placed in the custody of her mother at this time."

Following the hearing, the juvenile court entered an order returning the minor child to her mother's custody under the Department's protective supervision. The court reasoned:

Although [the mother's] cooperation and participation in services during her lengthy involvement in juvenile court with her older children has been sporadic at best, she now appears to have made some significant changes toward a healthy, substance free, lifestyle. While the primary safety concern has always been substance abuse by [the mother], she has now been drug-free by all accounts for the past 15-17 months. She has had regular [unsupervised] visitation with [L.S.], generally alternating weekends, but sometimes longer. She has been the parent primarily responsible for [L.S.'s] medical care. She has been parenting her six-month old infant without any reports of maltreatment. The family's new FSRP worker . . . has observed no concerns regarding [the mother's] parenting skills and has no concerns returning [L.S.] to [the mother's] care. . . .

The father appeals.¹

II. Discussion.

The father claims the juvenile court erred in removing the child from his custody and returning her to the mother. We disagree for the reasons that follow.

After a dispositional hearing, the juvenile court may enter an order “permitting the child’s parent, guardian or custodian at the time of the filing of the petition to retain custody of the child,” Iowa Code § 232.101(1), or “transferring the legal custody of the child to . . . [a] parent who does not have physical care of the child, other relative, or other suitable person.” Iowa Code § 232.102(1)(a)(1).

¹ Neither the mother nor the State filed a brief in this appeal. The State did not do so because the juvenile court rejected the Department’s recommendation that the child remain in the father’s custody, and the State did not separately appeal that order. Thus, no party contends the dispositional review order is in whole or in part an interlocutory order. See *In re W.D.*, 562 N.W.2d 183, 185 (Iowa 1997) (“As with all other orders, appealability depends on whether a juvenile court order is found to be ‘final.’ . . . [A] ruling is not final if the court intends to do something further to signify its final adjudication of the case, and . . . ‘a juvenile court order is not final unless it disposes of all the issues.’” (emphasis removed) (citations omitted)). Though the court’s order contemplated further action would occur in the case and suggested not all issues were disposed of, our supreme court has allowed appeals from dispositional review orders without questioning the appealability of such orders. See, e.g., *K.B.*, 753 N.W.2d at 15; *In re Blackledge*, 304 N.W.2d 209, 213 (Iowa 1981). We will do the same here.

“The goals of a child’s placement and the next step in juvenile proceedings vary with the type of placement.” *In re B.L.*, 470 N.W.2d 343, 345 (Iowa 1991).

If a child is placed pursuant to section 232.101, the child remains at home with the parent and may be subject to certain terms and conditions set by the court, such as supervision of the child and the parent by the Department, for an initial period of no more than twelve months. Iowa Code § 232.101(1), (2); *B.L.*, 470 N.W.2d at 345. “Conversely, placement of a child pursuant to section 232.102 takes the child out of his or her home.” *B.L.*, 470 N.W.2d at 345. If a child is placed with a noncustodial parent or other relative, the Department must make reasonable efforts “to make it possible for the child to safely return to the family’s home.” Iowa Code § 232.102(5)(b); *B.L.*, 470 N.W.2d at 345. Additionally, the court is also required to hold periodic dispositional review hearings “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.” Iowa Code § 232.102(9).

The father argues L.S. was not in an out-of-home placement under section 232.102 and was instead allowed to remain in his custody under section 232.101. We conclude otherwise. Although the juvenile court’s dispositional order did not specify which section it utilized when placing the child in the father’s custody, we believe the placement was made pursuant to section 232.102. This is because the father never had actual custody of L.S. before the proceedings herein, though she was in his physical care.

“[T]o qualify as a parent who may retain custody under section 232.101(1), [the] father must show not only that he is a parent, but also that he had a right to custody of” the child. *B.L.*, 470 N.W.2d at 345. The parents in this case were never married. See *id.* (stating under what is now section 600B.40, the mother of a child born out of wedlock whose paternity has not been acknowledged within a reasonable time after the child’s birth has sole custody of the child unless the court orders otherwise). The father does not argue he acknowledged paternity of the child within a reasonable time after her birth, nor is there any evidence in the record showing that he did so. And the father never petitioned for any custody or visitation rights outside of these proceedings. The juvenile court seemed to acknowledge this state of affairs in its dispositional review order, in which it stated: “While [L.S.] had been in the legal custody of her mother . . . at the time the CINA petition was filed . . . she had been voluntarily placed with her father. . . . No custody order exists outside of Juvenile Court regarding the custody and physical care of [L.S.]”

We accordingly conclude the juvenile court’s dispositional order placed L.S. in her father’s custody pursuant to section 232.102(1)(a)(1). Thus, at the subsequent dispositional review hearing, the mother was required to show the child would not suffer harm if returned home. *In re Blackledge*, 304 N.W.2d 209, 214 (Iowa 1981). The harm that must be negated is that specified in section 232.2(6) and consists of the grounds for adjudicating a child to be in need of assistance. *Id.*; see also Iowa Code § 232.102(9) (“The placement shall be terminated and the child returned to the child’s home if the court finds by a

preponderance of the evidence that the child will not suffer harm in the manner specified in section 232.2, subsection 6.”).

From our de novo review of the evidence, we agree with the juvenile court that the mother met her burden of proof. The child was removed from the mother’s care because of her substance abuse. See *Blackledge*, 304 N.W.2d at 214 (“Ordinarily the relevant grounds in the review hearing will be those on which the adjudication was based.”). At the time of the review hearing, the mother had been sober for at least fifteen months. Although the caseworker was concerned about the mother relapsing given her past history, the mother testified that she was actively participating in aftercare treatment. She regularly met with an Alcoholics Anonymous sponsor, as well as a parent partner,² both of whom testified on her behalf.

The sponsor stated the mother had worked hard to change her lifestyle and was fully involved in her recovery. The parent partner concurred, stating, “I absolutely feel that right now [she] is truly devoted to her recovery.” She testified the mother

has made huge steps in the last 15 months and . . . I’ve never seen this change in her before when she was coming to [Moms Off Meth in 2007], and . . . she’s just really changing . . . in every aspect of her life.

. . . .

I feel like [the mother] is very very much so a parent right now, and she is very capable of taking care of her children.

Though she had worked with the family for only a short time before the hearing, the in-home worker agreed and testified the child could be safely returned to the

² A “parent partner” helps parents “get through substance abuse issues, find recovery,” and locate services needed to assist them in that endeavor.

mother's custody. The child's guardian ad litem was mostly of the same mind, informing the court,

I can't say that there would be a safety concern if in fact [L.S.] was placed in the custody of her mother at this time. She's sober. She has a stable home, stable employment, but, nevertheless, there's been the ongoing concerns about, you know, the history and what led us to this point to begin with over the . . . course of the last four years, and the disruptions in [L.S.'s] placement up until [a] couple of years ago and the fact that she has been living with [the father] since that time.

The caseworker disagreed with the other professionals due to his concerns about the "roller coaster ride" the mother has been on since 2007 regarding her struggles with substance abuse.

The juvenile court acknowledged the caseworker's apprehensions, but stated,

Recently, however, [the mother's] roller coaster ride has had more peaks and fewer valleys. By all accounts, she has been drug and alcohol free for the past 15-17 months. She has been cooperative with random drug testing, and all recent drug patches have come back clean. She is currently complying with all probationary requirements of her criminal case. While the Court recognizes that complying with probation does not necessarily equate with ability to parent, it is indicative of [the mother's] serious commitment to becoming a better parent and substance-free.

While the mother's past performance does give us some pause, as it may be indicative of the quality of future care she is capable of providing, see *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981), we cannot discount the strides she has made throughout the course of this case. The goal of chapter 232 is "that each child under the jurisdiction of the court shall receive, *preferably in the child's own home*, the care, guidance and control that will best serve the child's welfare and the best interest of the state." Iowa Code § 232.1 (emphasis added); see

also *Blackledge*, 304 N.W.2d at 214 (“The integrity of the family must be taken seriously.”). A review hearing should never be a re-adjudication of the original neglect. *In re Welcher*, 243 N.W.2d 841, 844 (Iowa 1976). “If it were, a parent might never recover his or her child.” *Id.*

“That a parent has once been guilty of misconduct or even child neglect, is not alone sufficient to deprive him of the custody of his child, where there is nothing to show he is not presently a fit and capable custodian for the child.”

Id. (citation omitted).

We find there was nothing presented at the dispositional review hearing, other than the mother’s past history, to show she was not presently a fit and capable custodian for her child. We accordingly affirm the juvenile court’s decision returning the child to her home. By doing so, we do not discount the excellent care the father has provided for the child since she was placed in his care in 2009.³ But a “parent’s right to have a child returned . . . is not measured by comparing the parent’s home to the foster home or an ideal home. Rather the parent’s right is established by negating the risk of recurrence of harm.” *Blackledge*, 304 N.W.2d at 214-15. We conclude the mother has made that showing here.

AFFIRMED.

³ Nor have we considered the father’s illegal status in this country in our analysis, which the father argues on appeal the juvenile court erred in doing.