IN THE COURT OF APPEALS OF IOWA

No. 2-217 / 11-2073
Filed March 28, 2012

IN THE INTEREST OF N.T.J.,
Minor Child,

H.J., Mother,
Appellant.

Appeal from the Iowa District Court for Scott County, John G. Mullen, District Associate Judge.

A mother appeals the district court's waiver of reasonable efforts and dispositional order in a child-in-need-of-assistance proceeding. **AFFIRMED IN PART; DISMISSED IN PART.**

Jack E. Dusthimer, Davenport, for appellant mother.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, Michael J. Walton, County Attorney, and Julie A. Walton, Assistant County Attorney, for appellee State.

Cheryl Fullenkamp, Davenport, attorney and guardian ad litem for minor child.

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

VOGEL, P.J.

A mother appeals after a contested waiver of reasonable efforts hearing combined with an uncontested dispositional hearing held on November 23, 2011. Written orders for both were filed on December 8, 2011. The mother was being criminally prosecuted for multiple acts of child endangerment, resulting in serious injury to her child. She therefore invoked her Fifth Amendment right against self-incrimination, impeding her ability to participate in reunification services. Based on the allegations of severe abuse of the child, the district court found aggravated circumstances existed and appropriately waived reasonable efforts for reunification. We therefore affirm the December 8 orders.[1] The mother additionally appeals the district court's September 12 removal order. This claim must fail because the removal order is not a final order and no application for interlocutory appeal was filed. We therefore dismiss as to this issue.

I. Background Facts and Proceedings

This family came to the attention of the Iowa Department of Human Services (DHS) in February 2011, based on allegations of denial of critical care and failure to provide adequate supervision and clothing to N.J. At that time, N.J., born in 2003, was walking to school without appropriate clothing for the cold weather and there were also concerns she was being locked in her room at home. Staff members at N.J.'s elementary school were also concerned about her small size and about reports from N.J. that she was not allowed to eat before or after school. DHS met with the family twice—once in February and once in

[1] The supreme court found the waiver-of-reasonable-efforts order was interlocutory but granted the appeal combined with the appeal from the dispositional hearing.

March of 2011. N.J.'s adoptive mother, Holly,[2] was "hostile and resistant to DHS involvement." In late February 2011, Holly withdrew N.J. from her elementary school and began homeschooling her.

In May 2011, additional information was reported to DHS when N.J. missed medical appointments to check her height and weight, as she was previously diagnosed as "failure to thrive." Holly denied DHS's attempts to have contact with the child. On June 9, 2011, N.J. was examined by a physician; at seven years old she weighed thirty-four pounds and was forty-two inches tall. The diagnosis of "failure to thrive" continued and the physician contacted DHS. Holly was again contacted by DHS but resisted efforts to resolve the situation. A home visit was attempted on August 16, 2011, with Holly refusing to permit DHS worker, Lisa Wischler, to enter the home to see N.J. On August 25, 2011, DHS filed an application for order for home visit pursuant to Iowa Code section 232.71B(4) and (5) (2011). The district court granted DHS the authority to enter Holly's home in order to make an assessment of possible child abuse, to evaluate the home environment, and to observe and interview N.J.

Pursuant to this order, Eric Gruenhagen, a Davenport police officer, accompanied DHS workers, Shannon Anderson and Laurie Lyndman, as well as Cheryl Fullenkamp, the child's guardian ad litem, to Holly's home on August 25, 2011. After twenty minutes of knocking on the doors, and attempting to gain the attention of the occupants, N.J. opened the side door. The condition of the home was described by DHS as follows:

[2] N.J. was adopted by Holly, her maternal aunt, after the parental rights of N.J.'s biological parents were terminated.

> The home was filthy, smelled strongly of cat and dog urine and feces, and had garbage strewn throughout the home. The garbage was overflowing onto the floor, and there were dirty dishes all over the kitchen, old food on the floor and throughout the home. Additionally, it was discovered that there were locks on the outside of [N.J.'s] door and that there were no furnishings or bedding in her room. The only thing found in [N.J.'s] room was a twin bed frame leaned up against the wall with a deflated air mattress hanging over the frame. [N.J.] was filthy, smelling strongly of cat urine. She was wearing dirty clothing and had dirty hands and feet. She also had numerous bruises on her body.

Photographs, which corroborated the descriptions above, were taken of N.J. and of the interior of the house. N.J. was removed from Holly's care and taken to Genesis East Hospital for three days of evaluation and treatment. On August 26, 2011, DHS filed an ex parte application for temporary removal. The district court ordered temporary care and custody of N.J. be placed with DHS. On August 31, a contested temporary removal hearing was held. On September 12, the district court ordered N.J. be placed in the custody of DHS for placement in foster care. On October 6, a protective order was filed in Holly's criminal proceeding to prevent Holly from contacting N.J. On October 7, all parties stipulated to the adjudication of N.J. as a child in need of assistance under Iowa Code section 232.2(6)(b), (6)(c)(2), (6)(e), (6)(g), and (6)(n). On November 10, DHS filed an application for hearing to waive reasonable efforts. A contested hearing as to the waiver of reasonable efforts was held on November 23, along with an uncontested dispositional hearing. On December 8, the district court issued an order waiving reasonable efforts, and ordering N.J.'s continued custody with DHS, continuing placement in foster care, and approving the proposed DHS case plan. Holly appeals.

II. Standard of Review

Our review of child-in-need-of-assistance (CINA) proceedings is de novo. *In re K.B.*, 753 N.W.2d 14, 15 (Iowa 2008). "We review the facts as well as the law and adjudicate rights anew." *In re M.M.*, 483 N.W.2d 812, 814 (Iowa 1992).

III. Removal

Holly first contends the district court erred in permitting hearsay testimony during the August 31 removal hearing and in relying on this testimony in granting DHS's request for removal. The September 12 removal order cannot be viewed as a final order because it "is temporary in nature and is dependent on what the district court will do" in the CINA proceeding. *See, e.g.*, *In re T.R.*, 705 N.W.2d 6, 10 (explaining the custody portion of a permanency order is not final because it is dependent on what the district court will do in the termination proceeding). In addition, the removal order provided the following notice:

> You are advised that your children are in an out-of-home placement. The time allowed by law to resolve the issues of abuse and neglect so that your children can be safely returned home to you is limited. If your children are under age four this may be as short as six months.

This language contemplates further action on behalf of the court. Therefore, the removal order is not final as it "did not dispose of all the issues in this case, and it did not conclusively adjudicate the rights of the parties." *See In re W.D., III*, 562 N.W.2d 183, 186 (Iowa 1997) (explaining that a non-dispositional order in a CINA case is not a final order). Because Holly did not file an application for interlocutory appeal and as such an application is required, we dismiss this issue. *See In re A.C.*, 443 N.W.2d 732, at 732 (Iowa Ct. App. 1989) (dismissing an

appeal where the district court's order was not final and no application for interlocutory appeal was filed).

IV. Psychological Evaluation

Holly next asserts the district court erred in mandating a psychological evaluation as a condition precedent for contact with N.J. She argues that she offered to participate in psychological testing if any information gathered would not be used against her in a criminal proceeding, implying that visitation was halted until *she* completed the evaluation. This is a misreading of the district court's order. To understand the December 8 order, some background regarding the district court's October 7, 2011 adjudicatory order is necessary. In that order, the district court stated, "The Department is requesting a psychological evaluation for the mother. Counsel for the mother is concerned regarding such evaluation for fear that information gathered may be used against her in criminal prosecution." Based on this information, the district court ordered, "psychological evaluation for the mother shall be provided to be paid through Court ordered service funds." Nowhere did the October 7 order state that psychological evaluation of Holly was a *prerequisite* or *condition* to contact with N.J. Instead, the district court recognized visitation was inappropriate at that time and suspended visitation "pending *N.J.'s work with her own therapist*." (Emphasis added). The district court did not condition visitation on Holly undergoing a psychological evaluation, but rather on N.J.'s progress in her therapy. In the December 8 order, the district court again recognized that DHS requested a psychological evaluation in order to address the mother's needs and dysfunction in the relationship between Holly and N.J. However, as in the earlier, October 7

order, the district court did not make the psychological evaluation a *prerequisite* or *condition* to contact with N.J. We find Holly's argument on appeal to be misplaced and therefore without merit. *See State v. Alberts*, 722 N.W.2d 402, 412 (Iowa 2006) (affirming issues that lacked merit); *Bauer v. Cole*, 467 N.W.2d 221, 223 (Iowa 1991) (affirming where issues raised on appeal had no merit).

V. Waiver of Reasonable Efforts

Holly finally alleges the district court erred in waiving reasonable efforts, as she had a constitutional right against self-incrimination and a constitutional right to family.[3] With respect to the right against self-incrimination, the district court stated,

> Mother is being prosecuted for the child abuse and neglect against [N.J.] On advice of both of her attorneys, she is not communicating with the Department of Human Services, which means she is not able to participate in any remedial process to resolve the adjudicatory harm so that reunification can occur.

Holly argues she was willing to participate in psychological evaluations, only if any statements or alleged admissions could not be used against her in her pending criminal case. The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. "The privilege applies equally to allow a person not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *In re*

[3] Holly argues the district court abused its discretion in waiving reasonable efforts because she "has the constitutional right to have a family, to be free of unnecessary governmental intrusion, and her inter-related rights to privacy." Holly did not raise this issue below. "An issue that is not raised at the trial court may not be raised for the first time on appeal." *In re C.S.*, 776 N.W.2d 297, 299 (Iowa Ct. App. 2009). We therefore find error was not preserved and we decline to consider this issue on appeal.

C.H., 652 N.W.2d 144, 148 (Iowa 2002) (internal quotation marks omitted). The State violates an individual's Fifth Amendment right against self-incrimination when it "compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered." *Id.* at 148–49.

In *C.H.*, a father argued his participation in a sexual offender treatment program would require an admission of his guilt regarding sexual abuse of his stepdaughter, and the failure to participate would result in the sanction of termination of his parental rights to his biological daughter. *Id.* at 148–51. Our supreme court held:

> In this case, [the father's] would-be statements that he abused his stepdaughter were not compelled by the State to prevent the potential sanction of losing his daughter. The court may not compel [the father] to admit his guilt in order to be eligible to regain custody of his daughter. *The court may, however, require [the father] to comply with the case permanency plan which includes treatment. Failure to do so may result in termination of his parental rights.*

Id. at 149 (emphasis added). While the court recognized that the State could not penalize the father for failing to comply with a court order "impinging on his right against self-incrimination," it further held that "this is as far as the Fifth Amendment privilege extends." *Id.* at 150. The court then explained,

> The State may require parents to otherwise undergo treatment, but it may not specifically require an admission of guilt as part of the treatment. Contrary to [the father's] assertions, a person's exercise of a constitutional right *may* indeed have consequences. One such consequence may be a person's failure to obtain treatment for his or her own problems.
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> We note that sexual offender treatment where the offender refuses to take responsibility for the abuse may constitute ineffective therapy. A parent's failure to address his or her role in the abuse may hurt the parents' chances of regaining custody and care of their children. However, these consequences lie outside the protective ambit of the Fifth Amendment. We acknowledge the

> fact that [the father] is faced with a dilemma, but we find it is not a dilemma that triggers constitutional protection.

Id. (internal citation omitted).

In its order waiving reasonable efforts, the district court cited to Holly's "restraint, given her pending prosecution." As part of the case permanency plan, Holly was asked to participate in a psychological evaluation; the State did not, however, compel Holly to provide information to incriminate herself. Instead, the nature of the charges and the issues to be addressed were so closely intertwined that addressing the underlying psychological issues would require Holly to be honest with psychologists regarding her treatment of N.J. Nevertheless, an evaluation was never completed as two different psychologists determined that if they were unable to ask about Holly's care of N.J., their ability to conduct meaningful evaluations of Holly would be limited. As in *C.H.*, we recognize that the scope of the Fifth Amendment is not without limits and we acknowledge that Holly's failure to address her role in the abuse N.J. endured would—as the psychologists indicated—lead to an ineffective examination, which would in turn hinder her chances for reunification of N.J. *Id.* In balancing Holly's Fifth Amendment right against self-incrimination with her ability to respond to services that would correct the conditions that led to the abuse or neglect of the child within a reasonable period of time, we conclude that Holly's invocation of her Fifth Amendment right had consequences, including the district court's finding that Holly, "is not able to participate in any remedial process to resolve the adjudicatory harm so that reunification can occur."

Holly also claims the district court erred in finding, pursuant to Iowa Code section 232.116(1)(i), that there was "clear and convincing evidence that the offer or receipt of services would not correct the conditions which led to the abuse or neglect of the child within a reasonable period of time." *See* Iowa Code § 232.102(12)(b) (stating aggravated circumstances exist when circumstances under Iowa Code section 232.116(1)(i) apply). The district court concluded that pursuant to Iowa Code section 232.102(12)(b), clear and convincing evidence supported the waiver of reasonable efforts. The district court found:

> This child at the time of adjudication was age eight and was severely malnourished. The mother had been denying or withholding food from the child. The child had been locked in a bare room and had to seek permission to go to the bathroom. Any furniture and clothing for the child had been locked away in a closet.
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> . . . From the evidence before the court, the court concludes that N.J. was adjudicated a child in need of assistance upon a finding that the child suffered physical abuse and neglect as a result of acts or omissions of her mother. There exists clear and convincing evidence that the abuse or neglect posed a significant risk to the life of the child and/or constituted imminent danger to the child. This child was malnourished to the point of starvation. Her weight was below the fifth percentile. The report from Bettina Howell describes physical impairments and physical and functional developmental delays due to the abuse, neglect, confinement, and restraint applied by the mother to this child or at the mother's direction. This child was treated as badly as if she was a prisoner of war. The court further concludes that the offer or receipt of services would not correct the conditions which led to the abuse and neglect of the child within a reasonable period of time. Because of the mother's restraint, given her pending prosecution, meaningful services to resolve the adjudicatory harm have not even commenced. Visitation between the mother and child is being prohibited by the court to protect the child. The relationship between the mother and the child has been severely damaged to the point that Dr. Catherine Jackson, therapist for N.J., considers that recovery for N.J. will be a lengthy and long-term process. Mother's position has been entirely self-serving and defensive. She offers no love or support for N.J. and there is no basis to establish a

> relationship. N.J.'s description does not indicate a relationship existed to resurrect.

Given the details of the abuse suffered by N.J., we agree with the district court's finding that aggravated circumstances existed such that reasonable efforts were appropriately waived under Iowa Code section 232.102(12)(b).

We affirm the district court's dispositional order and its waiver of reasonable efforts; we dismiss as to the issue of removal.

AFFIRMED IN PART; DISMISSED IN PART.