IN THE COURT OF APPEALS OF IOWA

No. 8-004 / 07-2135
Filed February 13, 2008

IN THE INTEREST OF K.T. and A.G.,
Minor Children,

W.G.G., Father,
Appellant.

Appeal from the Iowa District Court for Polk County, Carol S. Egly, District Associate Judge.

A father appeals from a juvenile court order modifying a dispositional order in a child in need of assistance proceeding. **AFFIRMED.**

Edward Bull of Bull Law Office, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, John P. Sarcone, County Attorney, and Jon E. Anderson and Michelle Chenoweth, Assistant County Attorneys, for appellee-State.

John C. Heinicke of Kragnes & Associates, P.C., Des Moines, for appellee-mother.

M. Kathryn Miller, Juvenile Public Defender, Des Moines, guardian ad litem for minor child.

Considered by Huitink, P.J., and Zimmer and Miller, JJ.

MILLER, J.

Willie, the father of three children, appeals from a juvenile court order modifying a dispositional order to place the younger two children with their mother. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

Willie and Suprenia are the parents of three daughters, fifteen-year-old Shelby, eleven-year-old Kristin, and seven-year-old Asia ("the children"). Only the placement of the younger two is involved in this appeal. A decree dissolving the marriage of Willie and Suprenia apparently provides that Willie has physical care of the children.[1]

Following dissolution of the marriage, the children lived with Willie, most recently in Topeka, Kansas. In early July 2007 Willie brought the children to Des Moines, Iowa, to visit family. He left the children in Des Moines while he returned to Topeka for the weekend, but was arrested and incarcerated in Kansas, where he remained incarcerated at the time of the December 18 modification of disposition hearing that gives rise to this appeal.

At the time of Willie's arrest Suprenia's whereabouts were unknown. In mid-July 2007 the juvenile court ordered the children removed from Willie's custody and placed in the temporary legal custody of a maternal aunt and uncle. Child in need of assistance (CINA) petitions were filed in mid-July, alleging lack

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[1] The record is not clear regarding the custodial and physical care provisions of what apparently is a circa 2002 Polk County, Iowa decree dissolving their marriage. A social worker for the Iowa Department of Human Services (DHS) agreed, in response to a leading question, that Willie had "sole legal custody" of the two younger children, but then testified that Willie had "sole physical custody" of them. Suprenia, on the other hand, told a child protective worker who was investigating alleged sexual abuse of Shelby by Willie that Willie and she had "joint custody" of the children.

of appropriate supervision and sexual abuse or imminent danger thereof. The juvenile court ordered that Willie have no contact with the children or their custodians. On July 23 an attorney entered his appearance on behalf of Willie. That attorney has thereafter represented Willie throughout the proceedings in juvenile court and in this appeal.

Following initiation of the CINA proceedings information was obtained indicating that an open child in need of care case regarding Shelby was pending in Kansas. The juvenile court for Polk County issued an order in mid-September finding Kansas had jurisdiction over Shelby and staying the Iowa proceeding as to her.

Following the children's removal from Willie's custody the DHS investigated allegations that Willie had sexually and physically abused Shelby. The investigation resulted in an August "founded" assessment report, finding that the allegations of both sexual abuse and physical abuse were "confirmed."

In late September the juvenile court adjudicated Kristin and Asia as CINAs, on the grounds alleged in the CINA petitions. The court continued their temporary legal custody in the paternal aunt and uncle, and continued the no contact order in effect. It ordered that the "DHS shall initiate a ICPC [Interstate Compact on the Placement of Children] home study on [Suprenia's] home." The order indicates that Willie's attorney attended the hearing that resulted in the order, and was sent a copy of the order. An October 31 dispositional order continued temporary legal custody of Kristin and Asia in their paternal aunt and uncle, subject to DHS supervision.

On November 6 the State filed a motion alleging the paternal aunt and uncle had indicated they could no longer maintain Kristin and Asia in their home, and requesting modification of disposition to place them with a maternal great aunt and uncle. The juvenile court scheduled a hearing on the motion for January 14, 2008, at a time previously set for a dispositional review hearing.

At some time after the juvenile court stayed proceedings concerning Shelby, the Kansas court requested a ICPC study of Suprenia's home in Michigan, for possible placement of Shelby with Suprenia. Shelby was placed with Suprenia in October, and was living in Suprenia's home when the ICPC study requested by the Iowa juvenile court occurred in mid-November. The study resulted in a November 20 finding that "everything appear[s] to be suitable for placement" and recommended that Kristin and Asia be placed with Suprenia. Following a December 18, 2007 modification of disposition hearing the juvenile court ordered custody of Kristin and Asia be placed with Suprenia, under DHS and ICPC supervision.[2] Willie appeals.

II. SCOPE AND STANDARDS OF REVIEW.

Our scope of review in 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 findings of fact, but we are not bound by them. *Id.* Our overriding concern is the best interest of the children. *In re E.H. III*, 578 N.W.2d 243, 248 (Iowa 1998).

[2] Sometime between November 6 and December 18 Kristin and Asia had been moved from the home of their paternal aunt and uncle and placed in the home of the maternal great aunt and uncle.

III. MERITS.

Iowa Code section 232.103(1) (2007) provides for modification of a dispositional order prior to its expiration. The party seeking modification of a dispositional order must show that the circumstances have so materially and substantially changed that a modification is in the best interest of the children. *In re D.S.*, 563 N.W.2d 12, 14 (Iowa Ct. App. 1997). This standard applies not only to modification of custody provisions of a dispositional order, but also to modifications of other provisions, such as visitation and service. *In re C.D.*, 509 N.W.2d 509, 511 (Iowa Ct. App. 1993). In such a proceeding the focal point is the best interest of the children. *Id.*

Willie claims his attorney "was given insufficient notice as to the nature of the hearing." Although he makes no express claim of error by the juvenile court (as to this or any of the other issues he raises on appeal), it appears this claim must be that the court erred by overruling the motion for continuance made by his attorney when his attorney was given written notice of the hearing at the commencement of the hearing.

At the September 27, 2007 adjudication hearing the juvenile court ordered an ICPC study of Suprenia's home in Michigan. Willie's attorney was thus then aware that Suprenia was to be considered as a possible placement for Kristin and Asia. The DHS received the ICPC report on December 13, a Thursday. The hearing was held on December 18, the following Tuesday. Willie's attorney acknowledged at the hearing that he had received a phone call from the DHS worker "last week indicating that she wanted to know my position." The "position" concerning which the DHS worker inquired was presumably the position of Willie

and his attorney regarding the ICPC recommendation of placement with Suprenia, and the call must have been received on Thursday or Friday, five or four days before the hearing.

Willie also claims that as a result of insufficient notice of the nature of the hearing he was "not given ample time in which to consult with his attorney and prepare argument." However, as pointed out by the State and shown by Willie's attorney's statements at the hearing, Willie's attorney knew from communications with his client that Willie "was universally opposed to the children being transferred or living in the state of Michigan."

It thus appears from the record that Willie's attorney and Willie had known since late September that Suprenia would be considered as a placement for the two younger children, and had known for four or five days before the hearing that it would be a hearing to consider modification of placement, with placement with Suprenia a possible outcome. We conclude Willie and his attorney had sufficient notice as to the nature of the December 18 hearing. We further conclude that, as urged by the State, with Willie's attorney's clear knowledge of his client's firm position regarding possible placement with Suprenia, further attorney-client consultation about the hearing would have changed nothing about the position to be taken or argument to be made. We do note that, as pointed out by the State, even now Willie provides no explanation as to how additional time before the hearing would have benefited his case. In summary, we find no lack of adequate notice and no abuse of discretion in the court's overruling of the motion for continuance.

Willie claims the ICPC home study performed by the Michigan Department of Human Services "should not have been admitted into evidence as it lacked foundation."[3] Beyond his stated issue, however, he argues that the home study was inadmissible hearsay, as the record is devoid of foundational evidence to prove the study admissible under the business records exception to the hearsay rule.

In response the State argues, in part, that even if the juvenile court erred in admitting the challenged evidence Willie suffered no prejudice and no reversible error thus appears. For the following reasons, we agree.

"Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of a party is affected . . . ." Iowa R. Evid. 5.103. Prejudice will not be found from the erroneous admission of hearsay where substantially the same evidence is in the record without objection and thus the evidence in question is merely cumulative. *State v. Hilldreth*, 582 N.W.2d 167, 170 (Iowa 1998); *State v. Rice*, 543 N.W.2d 884, 887 (Iowa 1996). Here, State's Exhibit 1, a written report from the Iowa DHS, was admitted without objection. It refers to the Michigan home study and reports its "recommendation that Kristin and Asia be placed their mother, as the home appears to be suitable

[3] The objection to the home study, State's Exhibit 2, as stated at the hearing, was in relevant part "lack of foundation," which the juvenile court overruled. We question whether the objection was adequate to preserve error on the question of adequacy of foundation. *See State v. Buckner*, 214 N.W.2d 164, 167 (Iowa 1974) ("We have often said it is not reversible error for a trial court to *overrule* a general objection that no proper foundation has been laid."); *Twin-State Eng'g & Chem. Co. v. Iowa State Highway Comm'n*, 197 N.W.2d 575, 581 (Iowa 1972) ("Reversible error may not be predicated upon a general objection that no proper foundation has been laid for admission of evidence."). However, because we resolve this claim of error on other grounds we need not decide whether the objection was sufficient to preserve error concerning adequacy of foundation.

for placement." We conclude the ICPC home study was cumulative to other evidence in the record without objection, Willie suffered no prejudice from its admission, and thus no reversible error appears.

Willie claims that placing Kristin and Asia with Suprenia in Michigan prevents him from reunifying with them and effectively waives reasonable efforts without a finding that circumstances for such a waiver exist. He argues that at the time of the modification hearing the State had offered him no services other than addresses to which to send mail.

Willie has not requested or demanded any other, different, or additional services, and has not identified any services he might have been provided, given his ongoing incarceration in another state. Although the State has an obligation to make reasonable efforts toward reunification, a parent has an equal obligation to demand other, different, or additional services in a timely manner, and a failure to do so leaves no issue to review on appeal. *See, e.g.*, *In re A.A.G.*, 708 N.W.2d 85, 91 (Iowa Ct. App. 2005) (stating, in an appeal from a permanency order, that the parent has an obligation to demand any other, different, or additional services prior to a permanency or termination hearing); *In re S.R.*, 600 N.W.2d 63, 65 (Iowa Ct. App. 1999) (holding that where a parent did not demand services other than those provided prior to the termination hearing the issue of adequacy of services had not been preserved for appellate review); *In re R.J.*, 495 N.W.2d 114, 117 (Iowa Ct. App. 1992) ("As a general rule an issue not presented in the juvenile court may not be raised for the first time on appeal."). We conclude that any issue concerning adequacy of services is not properly before us.

Willie also argues that at such time as his incarceration ends visitations would be a problem because of the distance from his home in Kansas and the CINA cases pending in Iowa. The permanency goal remains reunification of the children with a biological parent. However, Willie remains incarcerated and the record contains no substantial evidence as to when he may be released on any current charge or conviction, or whether he faces or may yet face charges in Kansas for sexually abusing Shelby. Further, Kristin is in therapy, Shelby may need therapy, when released Willie may be required to participate in therapy, the no contact order remains in effect, and the record indicates that any visitation between Willie and the children may depend upon a recommendation from the children's therapist or therapists. Under these circumstances we find any concerns about the potential difficulty of future visitation to be premature and speculative, and conclude they present no reason to overturn the placement decision of the juvenile court.

Willie claims the placement of Kristin and Asia with their mother is contrary to their best interest. He argues the record does not demonstrate how changing their placement is in their best interest. He points out that Suprenia had limited contact with them over the last several years, and argues that no arrangements had been made concerning schooling for the girls or a therapist for Kristin.

For almost five years before the CINA proceedings Suprenia had phone contact, but no face-to-face contact, with the children. Her limited contact was a result of her fear of Willie, and perhaps also a result of geographic distance between her and the girls. However, following commencement of the CINA cases Suprenia not only had frequent phone contact with the children, but she

visited Kristin and Asia in Iowa on four occasions and the visitations went well. Kristin and Asia enjoyed the visits and were comfortable with their mother. According to the DHS caseworker, Kristin appeared to be "very bonded" with Suprenia, Asia was "excited to be back with her mom," and both girls privately told the caseworker they wanted to go live with Suprenia. Shelby had been with Suprenia since October 2007, and Kristin and Asia have a strong bond with Shelby. Suprenia had expressed her willingness to arrange therapy for Kristin. We are unwilling to assume that Suprenia would not make appropriate arrangements for the children's schooling.

It is not known when Willie may be released, and when he is released it may be a long time before circumstances have so changed that contact with the children will be permitted. The record does not indicate that the children's great aunt and uncle could be a long-term placement for Kristin and Asia. Kristin and Asia are closely bonded with Shelby, and are bonded with their mother, who is able and anxious to provide them with an appropriate home. We conclude there have been material and substantial changes in circumstances such that it is in Kristin's and Asia's best interest that the dispositional order be modified to place them with their mother, Suprenia.

IV. CONCLUSION.

We affirm the order of the juvenile court.

AFFIRMED.