

IN THE COURT OF APPEALS OF IOWA

No. 8-297 / 08-0395
Filed May 14, 2008

**IN THE INTEREST OF K.B.,
Minor Child,**

**E.A.B., Grandmother,
Appellant.**

Appeal from the Iowa District Court for Scott County, Nancy S. Tabor,
Judge.

A child's grandmother and legal guardian appeals from a juvenile court
ruling entered following a review hearing in a child in need of assistance
proceeding. **AFFIRMED.**

Cheryl Fullenkamp, Davenport, for appellant grandmother.

Patricia Rolfstad, Davenport, for mother.

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

Stephen Newport of Newport & Newport, P.L.C., for minor child.

Considered by Vogel, P.J., and Zimmer and Baker, JJ.

ZIMMER, J.

Elizabeth, the maternal grandmother and legal guardian of Kourtney, appeals from a juvenile court ruling entered following a review hearing in a child in need of assistance (CINA) proceeding. She contends the juvenile court violated her due process rights by holding the review hearing when she did not have counsel and by failing to provide her with adequate time to review exhibits. She also contends the juvenile court exceeded its authority when it ordered a change of custody following the review hearing. We affirm the juvenile court.

I. Background Facts and Proceedings.

Lynsey is the mother of Kourtney, born in February 2001.¹ Elizabeth is Kourtney's maternal grandmother. She became Kourtney's legal guardian and conservator in 2004.

On July 17, 2007, Kourtney was adjudicated a CINA under Iowa Code sections 232.2(6)(c)(2) and 232.2(6)(d) (2007).² The basis for the adjudication was the sexual abuse of Kourtney by her maternal grandfather, Tom, who was residing in the family home at the time.³ The juvenile court found there were prior issues of sex abuse in this family, including founded sexual abuse reports between Tom and his daughter Lynsey when she was a child. In its adjudication order, the court allowed Kourtney to remain in the care of Elizabeth subject to Elizabeth's compliance with a safety plan that prohibited contact between Tom

¹ Kourtney's father is deceased.

² At the time the State filed a petition to adjudicate Kourtney a CINA, Lynsey was incarcerated.

³ Tom was also accused of sexually abusing Kourtney's five-year-old cousin on several occasions.

and Kourtney. At the time the court entered its order, Elizabeth planned to divorce Tom, who was no longer residing in the home.

Following the CINA adjudication, the Iowa Department of Human Services (Department) made efforts to maintain Kourtney in Elizabeth's home and achieve permanency. The efforts included individual therapy for Kourtney; psychological evaluations for Kourtney, Tom, and Elizabeth; and individual counseling sessions for Elizabeth.

On August 30, 2007, an uncontested disposition hearing was held. The court found Kourtney was being maintained safely in the custody of Elizabeth. The court also found that Tom was not residing in Elizabeth's home and did not have access to Kourtney. A review hearing was scheduled for February 20, 2008, and the Department was ordered to submit and file a written report to the court prior to this hearing.

The court held a contested review hearing on February 20, 2008. Elizabeth was not represented by an attorney at the hearing. Seven exhibits were entered into evidence at the hearing, including the Department's report to the court, dated February 17, 2008. That report recommended Kourtney's custody be changed to her paternal grandmother. After considering the evidence presented, the court ordered Kourtney be removed from Elizabeth's custody and placed in the custody of her paternal grandparents. In its ruling, the court stated:

There is clear and convincing evidence that it would be contrary to the welfare of the child to remain in the home of the maternal grandmother. This is a case where actions speak louder than words. The grandmother historically will state she is willing to cooperate and keep the perpetrator from having contact with his victim and then retracts and allows him to return to the home. . . . The court is not at all convinced that [Elizabeth] has the capacity,

nor the long-term desire to keep Kourtney safe from her husband. She repeated[ly] has stated that she needs his help to raise the child.

Elizabeth appeals from this order.

II. Scope and Standards of Review.

Our review of an action arising from CINA proceedings is de novo. *In re B.B.*, 598 N.W.2d 312, 315 (Iowa Ct. App. 1999). We give weight to the fact findings of the juvenile court, especially when considering the credibility of witnesses, but we are not bound by these findings. *In re D.S.*, 563 N.W.2d 12, 14 (Iowa Ct. App. 1997). Our primary concern is the best interests of the child. *In re E.H. III*, 578 N.W.2d 243, 248 (Iowa 1998).

III. Discussion.

Elizabeth first claims her due process rights were violated because she was not represented by an attorney at the hearing and did not have adequate time to review the Department's exhibits. The State and the child's attorney and guardian ad litem argue that Elizabeth has not preserved error on these issues. Upon review of the record, we conclude that error was not preserved.

We agree with Elizabeth's claim that she had a statutory right to counsel. See Iowa Code § 232.89(1) ("[T]he parent, guardian, or custodian identified in the petition shall have the right to counsel in connection with all subsequent hearings and proceedings. If that person desires but is financially unable to employ counsel, the court shall appoint counsel."). The record reveals that Elizabeth was represented by an attorney during the previous court hearings regarding this matter. On October 11, 2007, she received a letter from her attorney stating that he had been appointed as a full-time judge and was closing

his law practice. The letter stated that his office partner would take over Elizabeth's conservatorship matter. It also stated:

[My office partner] does not practice in juvenile court, and I am uncertain who to recommend. I am not certain you need an attorney at this point, but I would certain[ly] refer you to someone if you wish. Please email me and let me know.

The record does not indicate whether or not Elizabeth responded to this letter.

Elizabeth appeared without an attorney at the dispositional review hearing held February 20, 2008. She did not request that counsel be appointed for her or state any objection to proceeding without an attorney. In addition, she did not raise the issue of receiving the Department's exhibits in an untimely manner and made no claim she did not have enough time to review them. Because Elizabeth did not raise these issues before the juvenile court, they are not preserved for our review, and we will not address them in this appeal. See *In re A.M.H.*, 516 N.W.2d 867, 872 (Iowa 1994); *State Farm Mut. Auto. Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 206-07 (Iowa 1984); *In re N.W.E.*, 564 N.W.2d 451, 455-56 (Iowa Ct. App. 1997).

Elizabeth next claims the juvenile court exceeded its authority when it ordered a change of custody and placed Kourtney with her paternal grandparents at the review hearing. We find it unnecessary to address this argument because we conclude the parties tried the change of custody issue by consent. See Iowa Code § 232.93.⁴

⁴ Iowa Code section 232.93 provides:

When it appears during the course of any [CINA] hearing or proceeding that some action or remedy other than those indicated by the application or pleading appears appropriate, the court may, provided all necessary

We believe the record supports the conclusion that all parties knew about the proposed change in Kourtney's custody in advance of the February 2008 hearing. The Department's report to the court states that "the Department of Human Services respectfully recommends that it is in the best interest and safety of the child that: . . . [p]lacement be changed to paternal grandmother . . . because of [Elizabeth's] and Tom's goal to have Tom back in the home with Kourtney." A "cc" at the bottom of this report indicates that the Department provided Elizabeth with a copy of its report. At the hearing, no party voiced surprise or claimed any prejudice when the assistant county attorney argued to the juvenile court, "Your Honor, we understand this is a review hearing, but it's the State's recommendation, also [the Department and the guardian ad litem would agree that Kourtney] should be placed with the paternal grandmother." Elizabeth did not assert that the proposed change in custody should not be litigated, and she did not challenge any of the factual assertions in the Department's report. Instead, she simply disagreed with the proposed change in custody stating that "Kourtney's been through enough, and she needs to stay home with me." We conclude the juvenile court properly ordered a change of custody after determining Kourtney's best interests required an immediate transfer of custody to remove her from an environment which had clearly become unsafe.

We affirm the decision of the juvenile court.

AFFIRMED.

parties consent, proceed to hear and determine the other issues as though originally properly sought and pleaded.