IN THE COURT OF APPEALS OF IOWA

No. 9-354 / 09-0410
Filed May 29, 2009

IN THE INTEREST OF E.V. JR., and A.V.,
Minor Children,

R.P.F., Mother,
Appellant,

E.V. SR., Father,
Appellant.

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

A mother and father each appeal from the order modifying placement of their children. **AFFIRMED ON BOTH APPEALS.**

Maria Ruhtenberg of Whitfield & Eddy, P.L.C., Des Moines, for appellant-mother.

Andrea M. Flanagan of Sporer & Flanagan, P.C., Des Moines, for appellant-father.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, John P. Sarcone, Attorney General, and Jon Anderson, Assistant County Attorney, for appellee.

Jerry R. Foxhoven, Drake Legal Clinic, and Brendon D. Moe, Student Attorney, Des Moines, attorney and guardian ad litem for minor children.

Considered by Sackett, C.J., and Vogel and Miller, JJ.

SACKETT, C.J.

Eleazar Sr. (the father) and Rachel (the mother) each appeal from the order modifying placement of their two children, Athena and Eleazar Jr. (Eleazar), born in 2005 and 2008, respectively. Both contend there is insufficient evidence to justify a modification of placement. The father further contends the court erred in allowing the guardian ad litem to proceed as if there were an "emergency removal" when it was clear from the guardian ad litem's application there was not an emergency. We affirm on both appeals.

Scope of Review. We review child-in-need-of-assistance proceedings de novo. Iowa R. App. P. 6.907; *In re K.B.*, 753 N.W.2d 14, 15 (Iowa 2008). We give weight to the juvenile court's findings of facts, especially when considering the credibility of witnesses, but are not bound by them. *In re N.M.*, 528 N.W.2d 94, 96 (Iowa 1995). "A party seeking a modification of a prior dispositional order must show the circumstances have so materially and substantially changed that a modification is in the best interests of the child." *See In re D.S.*, 563 N.W.2d 12, 14 (Iowa Ct. App. 1997).

Background. Athena first came to the attention of the Department of Human Services in August of 2005 after the father assaulted the mother while she was holding Athena. The mother got away long enough to hand Athena to a relative. The father then beat the mother with his fists, and threw her to the sidewalk. Athena was found to be in need of assistance in May of 2006. Eleazar tested positive for cocaine at birth and was found to be in need of assistance in February of 2008. The children were placed in their father's care after the

February 26 dispositional hearing. Later hearings continued their placement "in the home of father." Following a review hearing on December 9, the court found the children could "remain in the home of both parents." In January of 2009, the guardian ad litem filed a motion to modify placement, requesting that the children be removed from the care of both parents.

At the hearing on the motion, scheduled for February 5, attorneys for the mother, father, and State advised the court they had not received a copy of the motion. The court recognized the parents did not receive notice, but based on its statutory authority in Iowa Code section 232.103(1), the court treated the hearing as an emergency modification and allowed the guardian ad litem to present evidence. At the close of evidence, the court stated: "This is not something that I want to enter as an order, but I will. I will place the two children in the custody of DHS—temporary custody of DHS for purposes of foster care placement." In its handwritten ruling, the court found "clear and convincing evidence that continued placement of the children with the parents would result in substantial safety risks for the children." The court set the continuation of the hearing for February 20. Because of conflicts with that date, it was rescheduled for March 4.

At the continuation of the hearing, the State offered its exhibits and the parents presented their evidence. The guardian ad litem presented no additional evidence. The court made specific oral findings that it incorporated into its subsequent handwritten ruling:

> The court finds that the guardian ad litem has presented clear and convincing evidence that to continue the children in the home of their parents would subject them to continued neglect,

> improper supervision, due to the parents' unresolved issues regarding mental health, and substance abuse, and violence.
>
> The court determines that the guardian has met its burden of proof; that at this point reasonable efforts have been made to avoid placement outside the home; that those have been detailed in extensive exhibits. This court has made every effort to keep the children in the home of at least one of their parents or a relative.
>
> At this time the specific finding is made that because of the intertwining issues of violence, criminal conduct, [and] substance abuse, that a family placement is not possible. There is a long record in this case. The court has tried family placements. That puts the family in a situation where they may not be able to be protective or may be at risk themselves. The court believes that as has always been stated, the relationship of each of these parents with their children, they are capable of being nurturing, wonderful parents, but when the issues of violence and abuse are entered into the home, it has become totally chaotic.
>
> We are, again, in a circumstance where this court believes that both parents have unresolved issues of all of those; that neither parent can be protective because of their intertwining issues of protecting themselves from apparently removal of the children; that the court cannot believe because of the motivation of both parents to conceal when the other parent is having issues, that one parent would go forward, would be protective, if it's one of the other parents.
>
> As I am finding now, the circumstances are such that the least restrictive option is the most restrictive option, which is placement outside of the custody of their parents. Placement is with DHS. Reasonable efforts have been made to avoid this conclusion.

In its written ruling, the court detailed the efforts made to avoid the children's removal from their parents' care. It continued the children's custody with DHS for purposes of foster care placement. The court found its aid was required and confirmed the children's prior adjudication as children in need of assistance.

Both parents appeal.

Mother. The mother contends there is insufficient evidence to support a modification of placement with regard to her. She argues that almost every

allegation in the motion to modify concerned the father's actions, that there were no allegations she had violated any laws or been noncompliant with requirements of the Department of Human Services; and that the only allegation concerning her was she had not told the department a warrant had been issued for the father. She further argues the department checked and found no warrant and, even if it were true she had not reported that a warrant had issued for the father, such "inaction" does not meet the standard for modifying a dispositional order.

While we agree the mother's failure to tell the department whether a warrant had been issued for the father's arrest, standing alone, may not meet the standard for modifying a dispositional order, the record before us supports the court's decision to modify the order and remove the children from their parents' home. Since the last review hearing in December, the mother has been increasingly inconsistent in using daycare, which is an integral part of the plan for her to be able to care for her children without removal. She is abusing alcohol. She has misused pain medications, rendering her unresponsive and unable to care for her children. With the father's increasing possibility of being removed from the home because of criminal charges, the mother would be left to care for the children by herself. We find the evidence supports removing the children from her care.

The mother also argues she provided care for her children when they were placed with relatives, even though the children were not in her custody. The court considered relative placement and rejected it. The father has caused

problems with relative placements in the past. The juvenile court was not required to place the children in relative care.

Father. The father contends the court erred in allowing the guardian ad litem to proceed at the February 5 hearing as if it were " an 'emergency removal' pursuant to section 232.78" even though the petition for modification did not show an emergency and the guardian ad litem did not prove the elements necessary for an ex parte removal. He asserts the court erred for three reasons, each based on the father's belief the action was "presumably pursuant to section 232.78."

The guardian ad litem argued the court had the authority to modify the dispositional order under section 232.103(1). He did not claim to be seeking an emergency ex parte removal under section 232.78. The court expressly cited section 232.103(1). While we recognize the proceedings would have been less confusing had the parents received proper notice before the hearing and all of the evidence could have been presented at one time, we conclude the court acted properly within its authority in section 232.103(1). The children already had been found to be in need of assistance and were under the jurisdiction of the court. "We believe it is implicit in the power of the juvenile court in monitoring its prior CINA orders to temporarily, even summarily, remove a child pending a hearing on the modification." *In re R.F.*, 471 N.W.2d 821, 823 (Iowa 1991). The father's claims that the court did not act properly pursuant to section 232.78 are without merit.

The father also claims the guardian ad litem failed to prove modification was necessary. Building on the presumption that the February hearing was pursuant to section 232.78, the father presumes the March hearing was pursuant to section 232.95(1), "to determine whether the temporary removal should be continued." He argues the March hearing was not within the ten-day period required. *See* Iowa Code § 232.95(1) (requiring a hearing within ten days of a temporary removal pursuant to sections 232.70 or 232.78). Because the court acted under section 232.103, not 232.78, the requirements of section 232.95 cited by the father are inapplicable. We also note that the delay in holding the continuation of the February modification hearing was caused in part by conflicts with the schedules of the parents' attorneys.

The father further claims the guardian ad litem presented no independent evidence in the March hearing—"neither live testimony nor exhibits," so there was insufficient evidence for the court to find modification was necessary. The father fails to recognize the March hearing was a continuation of the February hearing on the guardian ad litem's modification request, considered by the court pursuant to its authority under section 232.103, not 232.95. The court did not need to take judicial notice of evidence from earlier dispositional or review hearings. Clear and convincing evidence was presented by the guardian ad litem.

The father's claims all revolve around his mistaken presumptions concerning the nature of the proceedings and the statutory authority under which the court was operating. We conclude his claims are without merit.

Clear and convincing evidence supports the court's determination the best interests of the children required modifying the dispositional order to remove them from their parents' care and to place them in the safety and security of a foster home.

AFFIRMED ON BOTH APPEALS.