

IN THE COURT OF APPEALS OF IOWA

No. 1-138 / 11-0071
Filed March 21, 2011

IN THE INTEREST OF A.B.,
Minor Child,

A.B., Minor Child,
Appellant.

Appeal from the Iowa District Court for Muscatine County, Gary P. Strausser, District Associate Judge.

A guardian ad litem appeals from the juvenile court order dismissing the child in need of assistance petition. **REVERSED AND REMANDED.**

Brian J. Metcalf of Metcalf, Conlon & Siering, P.L.C., Muscatine, attorney and guardian ad litem for appellant minor child.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, Gary Allison, County Attorney, and Korie Shippee, Assistant County Attorney, for appellee State.

Mark J. Neary of Neary Law Office, Muscatine, for appellee mother.

Murray W. Bell of Murray W. Bell, P.C., Davenport, for appellee father.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Mansfield, J., takes no part.

EISENHAUER, J.

The guardian ad litem of A.B. appeals from the juvenile court order dismissing the child in need of assistance (CINA) petition filed with respect to A.B. The guardian ad litem alleges the juvenile court erred in concluding the State failed to prove the grounds for the CINA adjudication by clear and convincing evidence. The State did not appeal, but agrees with the guardian ad litem's position, as does the mother.

We review the juvenile court's ruling on the CINA petition de novo. *See In re K.N.*, 625 N.W.2d 731, 733 (Iowa 2001). We review the facts and the law both, and adjudicate rights anew. *Id.* Although weight is given to the juvenile court's findings of fact, we are not bound by them. *Id.* Our fundamental concern is the child's best interests. *Id.*

A.B. was born in January of 2007. Her parents separated in the spring of 2009 amidst allegations the father was abusive to the mother and were in the process of divorcing at the time of the CINA hearing. On August 24, 2010, the child told the mother about a game she played with the father called "find the secret." The child described how she would put a pacifier in her underwear and the father would reach in and take it out. The child also reported that her father would hide toys in his underwear and she would find them. The child had regressed in her toilet training and was inserting objects into her vagina.

On August 25, 2010, the Department of Human Services (DHS) was notified of allegations of sexual abuse perpetrated on A.B. by her father. A forensic interview was conducted by the director of the Mississippi Valley Child

Protection Center regarding the allegations. During that interview, A.B. was evasive when her father was mentioned, often not answering questions and attempting to change the subject. A.B. made multiple requests to leave and eventually urinated in her pants, at which time the interview was ended.

A second interview was conducted at the Child Protection Center on August 26, 2010. Again, the child was evasive and ignored questions asked of her. She did state her father “puts the binkie in my underwear” and her father had to find it, but when asked follow-up questions refused to answer. The interview was again ended when the child defecated in her pants.

In September 2010, the DHS determined the allegation of sexual abuse of A.B. by the father was founded. The State filed a petition to adjudicate A.B. in need of assistance pursuant to Iowa Code sections 232.2(6)(c)(2) and 232.2(6)(d) (2009) on September 17, 2010.

In October 2010, A.B. began attending play therapy with Candice Kundert. Kundert described the following incident:

On 11/11/2010, [A.B.] talked with me about daddy putting his “shooter” in her bottom and described it explicitly. She became very uncomfortable when discussing this. I asked her to describe it and she said it shoots white spots all over her body and makes bubbles in the tub. [A.B.] also said daddy’s shooter is attached to his body and that he also uses it to pee with. When he puts it in her bottom, she said it hurts. She also talked about not liking it when she has to sleep with her daddy with her clothes off and his clothes off. [A.B.] describes the shooter as looking like a hotdog with a ball on it. She has also told me it looks like a ball and bat. [A.B.] talks about his “shooter stick” a lot.

The hearing on the CINA petition was held on November 29 and December 15, 2010. The juvenile court entered its order on December 23, 2010,

dismissing the CINA petition for failure to establish the grounds for adjudication by clear and convincing evidence. The guardian ad litem filed a timely appeal.

A child is in need of assistance if he or she “has been, or is imminently likely to be, sexually abused by the child’s parent, guardian, custodian, or other member of the household in which the child resides.” Iowa Code § 232.2(6)(d). The State has the burden of establishing sexual abuse by clear and convincing evidence. See *In re B.B.*, 500 N.W.2d 9, 12 (Iowa 1993) (noting the State has the burden of proving the allegations in the CINA petition by clear and convincing evidence). Clear and convincing evidence is more than a preponderance of the evidence and less than evidence beyond a reasonable doubt. *In re L.G.*, 532 N.W.2d 478, 481 (Iowa Ct. App. 1995). It means that there must be no serious or substantial doubt about the correctness of a particular conclusion drawn from the evidence. *Id.*

In determining the evidence was insufficient to adjudicate A.B. as a CINA, the court noted the lack of physical evidence of sexual abuse. While a physical examination of A.B. did not yield any evidence of abuse, the physician who conducted the examination testified the lack of physical evidence does not indicate no abuse occurred; physical evidence of abuse would be most evident within seventy-two hours of the sexual contact and would vary depending on the type of contact.

Although there is no physical evidence to substantiate the allegations made against the father, A.B.’s statements and behaviors support a finding the abuse occurred. At the initial forensic interview, A.B. repeated the word “nothing”

over and over. In a later interview, A.B. told Kundert her father had told her to say “nothing.” Kundert also observed that when A.B. played with a toy house, she put up barriers and protectors around it and her play “always consists of hiding things or fortressing things.” Although A.B. had been toilet trained and doing well, she began regressing in her use of the toilet after beginning unsupervised visits with her father in March of 2010.¹ Kundert noted A.B.’s action of voiding in each of her forensic interviews was a sign of possible sexual abuse.

The juvenile court found it could not independently assess the statements made by A.B. in therapy because they lacked detail. Kundert described her view of the child’s reports of the abuse:

She also has a strong emotional content whenever she discusses her father or the sexual abuse. Often, [the mother] will type up what [A.B.] has told her ahead of time. What [A.B.] says to me is consistent with what her mother writes to me.

Kundert opined her belief A.B. has been sexually abused by her father.

A.B. was three and a half when she told her mother of the games she played with her father and when she was interviewed by the DHS. Her statements to Kundert were made when she was not yet four. Her tender age makes understandable her limited ability to describe what happened to her. However, her age does not undermine her credibility. Given A.B.’s description of her father’s “shooter” and the types of “games” they played, coupled with her behavior, we conclude the evidence leaves no serious or substantial doubt that

¹ The parents instituted divorce proceedings in California, where they resided at the time. While in California, the father’s supervision was supervised. However, after moving to Iowa in March 2010 his visitation was unsupervised.

A.B. has been sexually abused by her father. Because the grounds for a CINA adjudication pursuant to section 232.2(6)(d) have been proved by clear and convincing evidence, we reverse the juvenile court's order and remand for entry of an order adjudicating A.B. to be a child in need of assistance pursuant to section 232.2(6)(d).

REVERSED AND REMANDED.