IN THE COURT OF APPEALS OF IOWA

No. 1-322 / 11-0403
Filed May 11, 2011

IN THE INTEREST OF J.S. and J.D.,
Minor Children,

A.S., Mother,
Appellant.

Appeal from the Iowa District Court for Clarke County, Monty Franklin, District Associate Judge.

A mother appeals from adjudication and disposition rulings concerning her two children, which were based on June 2009 events. **REVERSED.**

Leanne M. Striegel-Baker of Booth Law Firm, Osceola, for appellant mother.

Marc Elcock, Des Moines, for father.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, and Michelle Rivera, County Attorney, for appellee State.

Jane Rosien, Winterset, for minor children.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

DANILSON, J.

The question before us is whether there is clear and convincing evidence that J.S. and J.D. are children in need of assistance (CINA) as defined by Iowa Code sections 232.2(6)(b), (c), or (n) (2009). Because the statutory grounds are not shown by clear and convincing evidence existing at the time of the CINA hearing, we reverse the juvenile court's adjudication and disposition rulings.

I. Background Facts and Proceedings.

On July 1, 2009, a child abuse investigation concerning J.S., born in June 2004, and J.D., born in May 2003, resulted in a founded abuse report against the children's mother, A.S., and her husband. A.S. had been physically abused by her husband (who is not the father of these children) in the presence of the children. A.S. was found to have denied her children critical care and to have failed to provide them proper supervision. The investigation also revealed the husband smoked marijuana in front of the children and A.S. admitted smoking marijuana. A.S. voluntarily placed the children with their paternal great-uncle and great-aunt, with whom she had lived as a teen.[1]

A Family Safety, Risk, and Permanency (FSRP) services provider, Katy Jamison of Children and Families of Iowa, provided supervised visits between A.S. and the children without court involvement for several months. Iowa Department of Human Services (DHS) social worker John Adams worked with the family. Family counseling was provided. Family team meetings were held in

[1] The children's father, F.D., has never had custody of the children and only recently sought visitation.

September, October, and December 2009, and January, February, March, and June 2010.

In June 2010, Adams recommended to A.S. that the children be placed under the legal guardianship of their great-uncle and great-aunt. A.S. did not agree, and Adams stated DHS would then file a CINA petition.

Supervised visits continued and, in October 2010, A.S. asked Adams to view her home and allow in-home visits. Adams refused to view the home until after court adjudication. He also told A.S. in-home visits would not be considered until a parenting assessment was completed.

Not until October 27, 2010, was a CINA petition filed asserting the children were CINA under Iowa Code sections 232.2(6)(b) ("Whose parent . . . or other member of the household in which the child resides has physically abused or neglected the child . . . .") and 232.2(6)(n) ("Whose parent's or guardian's mental capacity or condition . . . or drug or alcohol abuse results in the child not receiving adequate care."). Attached to the petition was a statement by Adams alleging FSRP services began August 12, 2009; the mother "has not demonstrated her ability to understand the effects of violence in her home and the children want to protect their mother instead of their mother wanting to protect them"; A.S. "has been inconsistent throughout the case in maintaining visitations and telephone contact"; the children "are angry at their mother when she does not show up for visits"; A.S. had moved in with a man on whom DHS completed a child abuse assessment suspecting he was manufacturing methamphetamines—"the assessment was not confirmed," but the sheriff's

department "express[ed] concerns" about the man's home; and A.S. did not agree to a guardianship with the current family where the children were placed.

A CINA adjudication hearing was held on January 19, 2011, and the juvenile court adjudicated J.D. and J.S. CINA pursuant to sections 232.2(6)(b), (c)(2)[2], and (n). The court made the following findings of fact: "The parents lack the ability to ensure the safety of the children; ongoing and substantial DV history, unstable relationships + residences, substance abuse issues, inconsistent visitation." The court also found that placement outside the parental home was necessary due to "lack of ability of parents to ensure the child's safety + due to necessity for therapy for the mother + children; history of D.V. + S.A." The court ordered A.S. to complete a psychosocial/parenting assessment.

A disposition hearing was held on February 23, 2011, and the juvenile court found the return of the children to A.S. "is currently contrary to the best interest of the [children] due to the need for continued services + the continued safety + supervision concerns."

A.S. appeals, arguing DHS failed to provide reasonable reunification efforts; she was denied due process where the children were adjudicated CINA on a ground not included in the petition; there was not clear and convincing evidence the children were CINA; and placement with the great uncle and aunt was not in the best interests of the children.

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[2] Subparagraph (c)(2) was not alleged in the petition. It provides CINA means an unmarried child:

> Who has suffered or is imminently likely to suffer harmful effects as a result of . . . [t]he failure of the child's parent, guardian, custodian, or other member of the household in which the child resides to exercise a reasonable degree of care in supervising the child.

II. Standard of Review.

Our scope of review in juvenile court proceedings is de novo. *In re K.N.,* 625 N.W.2d 731, 733 (Iowa 2001). We review both the facts and the law and adjudicate rights anew. *Id.* Although we give weight to the juvenile court's factual findings, we are not bound by them. *Id.* The State has the burden of proving the allegations in the CINA petition by clear and convincing evidence. Iowa Code § 232.96(2). Clear and convincing evidence means no serious or substantial doubt exists about the correctness of the conclusions drawn from the evidence. *In re S.J.M.,* 539 N.W.2d 496, 500 (Iowa Ct. App.1995).

III. Discussion.

Let us begin by saying that had this petition been filed in July 2009 the allegations that the children were then CINA would hardly be in doubt. However, the 2010 CINA petition *alleged events that occurred in June 2009.* The petition was not filed until October 2010 and not heard by the juvenile court until January 2011. Based on allegations and evidence of physical abuse and marijuana use in 2009, the juvenile court determined these children were *presently* CINA. We cannot countenance this post hoc adjudication where the facts have changed, and we therefore reverse.

In *In re K.M.*, 653 N.W.2d 602, 607-08 (Iowa 2002), our supreme court restated the principle that the parent-child relationship is constitutionally protected.

> Normally, there is no justification for the State's interference in the private relations of a family or for the State's examination of the judgment of parents in making decisions concerning the well being of their children. *Troxel v. Granville,* 530 U.S. 57, 68-69, 120 S. Ct. 2054, 2061, 147 L. Ed. 2d 49, 58 (2000). That is because "a

> parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" *Lassiter v. Dep't of Social Servs.,* 452 U.S. 18, 27, 101 S. Ct. 2153, 2159-60, 68 L. Ed. 2d 640, 649-50 (1981) (quoting *Stanley v. Illinois,* 405 U.S. 645, 651, 92 S. Ct. 1208, 1212, 31 L. Ed. 2d 551, 558 (1972)). Thus, "the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.'" *Quilloin v. Walcott,* 434 U.S. 246, 255, 98 S. Ct. 549, 555, 54 L. Ed. 2d 511, 520 (1978) (citation omitted).

See also In re A.M.H., 516 N.W.2d 867, 870 (Iowa 1994) ("A parent's interest in maintaining family integrity is best protected by the Due Process Clause."); *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484, 494 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.").

As noted above, the juvenile court based its CINA adjudication on sections 232.2(6)(b), 232.2(6)(c), and 232.2(6)(n). Section 232.2(6)(b) provides a child is CINA "[w]hose parent . . . or other member of the household *in which the child resides* has physically abused or neglected the child . . . .") (emphasis added). Section 232.2(6)(c), which was not alleged in the petition, but was asserted by the guardian ad litem in closing arguments at the adjudication hearing, similarly speaks to a child's present living arrangement, providing that a CINA is one:

> Who has suffered or is imminently likely to suffer harmful effects as a result of . . . [t]he failure of the child's parent, guardian, custodian, or other member *of the household in which the child resides* to exercise a reasonable degree of care in supervising the child.

(Emphasis added). Section 232.2(6)(n) defines a child CINA "[w]hose parent's or guardian's mental capacity or condition . . . or drug or alcohol abuse results in the

child not receiving adequate care." This provision is phrased in the present tense: it is aimed at a parent's *current* mental capacity or condition or drug or alcohol abuse that results in the child not receiving adequate care. By their very terms, sections 232.2(6)(b), 232.2(6)(c), and 232.2(6)(n) require that present circumstances support a CINA adjudication. Thus, statutorily the showing of "unfitness," described in *Quilloin* as being a required showing to interfere with parental rights, must be a *present* unfitness.

Sections 232.2(6)(b) and (c) are inapplicable here as both are based upon circumstances existing in the household "in which the child resides" and because these children did not reside with either of their parents at the time of the adjudication.

As for 232.2(6)(n), this record does not contain clear and convincing evidence of any present problem with A.S.'s mental capacity or condition, or of any present abuse of drugs or alcohol.

Adams and Jamison questioned A.S.'s ability to protect her children from further abuse. When asked, "And if the children were returned home today, what imminent danger are they in at this point?" Adams responded, "Again, I don't know whether A.S. is capable of keeping the boys safe. That would be my concern returning them today." Similarly speculative, Katy Jamison, the person assigned to supervise visits stated, "My fear is that if [A.S.] were to become involved with someone again, that she would not be able to protect the children, as she hasn't in the past, I assume, because she herself was being injured."

A.S.'s counsel summarized the situation:

> Q. So [A.S.] got herself out of a domestic violence relationship, placed her children in a safe home, or a home that she thought they were going to be safe, because she had no job. She renewed the no-contact order to protect her and her children. She has a job and a home. What other things is DHS requiring of [A.S.] for her to be able to have her children? A. [Adams] I believe because my continuing concern has been that she would be able to protect her children from violent relationships that she should, at least, have a parenting assessment to determine whether she is capable of keeping [J.] and [J.] safe.
>
> Q. You've been involved in this case for a year and a half and you haven't done a parenting assessment at this point? A. No.

There is evidence that A.S. was involved in an abusive relationship in 2009, and perhaps another prior to that. But we find no clear and convincing evidence for the juvenile court's finding of "ongoing" domestic violence.

Social worker John Adams asserted A.S. was in an abusive relationship with C.W. (at some unspecified time) after leaving her husband:

> Q. You testified there have been two reported incidents of domestic violence that [A.S.] has been involved in over the past year and a half. Do you recall that? A. Yes. One was reported and one was told to me, yes.
>
> Q. If I understand your question and your answer to that, when you testified you said that the children were present at both incidents. That's not true, is it? A. No, the children were only present at the first incident.
>
> Q. And you didn't investigate that second incident, did you? A. No. The children were not present.
>
> Q. And there was no police report done, was there? A. No.
>
> Q. Who was the witness that told you about it? A. I don't know whether I have to disclose that or not, but I believe it was a reliable witness.
>
> . . . .
>
> Q. With respect to this other domestic violence thing that you say has happened, you weren't there, correct? A. No.
>
> Q. You didn't see any injuries on [A.S.], did you? A. I didn't see any injuries. However, [A.S.] has come repeatedly throughout this case for the last year and a half complaining of several physical symptoms to virtually almost every time I have seen her in every family team meeting and every individual meeting and several visits, she appears to be physically in pain.

> Q. And you, it's my understanding, that you believe that the pain comes from this second incident of domestic violence? A. I don't know where it comes from.
>
> . . . .
>
> Q. And you having gotten any releases to any kind of physical history with [A.S.] to know what she's going through, do you? [3] A. No, I have not.

A.S. testified she had been in a relationship with C.W., but ended it when DHS informed her she had to choose between the relationship and her children. She stated the relationship had been over for several months. C.W.'s mother testified at the adjudication hearing that A.S. and C.W. were no longer in a relationship. Adams testified, "I don't know her relationship status." We conclude there was nothing but innuendo offered to support the allegation that A.S.'s relationship with C.W. was abusive. Adams' testimony reflects that his investigation of C.W. provided no proof of domestic violence:

> Q. When did she move out of Mr. [W's] apartment? A. I'm unclear of that. It would, according to what she said, would have probably been sometime in the spring of 2010.
>
> Q. Did you do a background check on Mr. [W]? A. Yes.
>
> Q. And what was on his background? A. There was no significant criminal background.
>
> Q. So no domestic violence? A. No.
>
> Q. No drugs? A. No.
>
> Q. And you told A.S. that she had to end that relationship if she wanted her kids back; correct? A. Yes.
>
> . . . .
>
> Q. And A.S. now has her own place; correct? A. As far as I know.

Moreover, Kenneth Hayes, A.S.'s counselor, testified that in his sessions with A.S. she had worked on issues of "[d]epression, making changes that she needed to make in order to provide a home for her sons, looking at the patterns

[3] Jamison's notes of a December 13, 2010 visit indicate A.S. stated a doctor told her she may have fibromyalgia. At trial, A.S. testified she has arthritis in her back.

of past relationships and any problems that might relate to past relationships," and that she had internalized the impact domestic violence has had on her children.

While A.S. admitted smoking marijuana in 2009, the State does not allege, nor does the record support, that A.S. has a current drug or alcohol abuse problem.

A.S. has had a job since the spring of 2010 (we note DHS provided no employment assistance or gas vouchers to A.S.); she has attended the majority of supervised visits offered; has provided only clean UAs; and has been attending mental health counseling on her own. A.S.'s counselor, Kenneth Hayes, testified A.S. has internalized the effects of domestic violence on her children. She has her own residence, which DHS has refused to view until after the CINA adjudication hearing. When A.S. asked for unsupervised visits, Adams said "that would be one of the topics that we would discuss at this court hearing."

Upon our de novo review, we conclude the juvenile court's CINA adjudication findings are not supported by clear and convincing evidence as the facts existed at the time of the CINA hearing. We therefore reverse the juvenile court's rulings adjudicating these children to be CINA.

REVERSED.