

IN THE COURT OF APPEALS OF IOWA

No. 1-516 / 11-0751
Filed July 27, 2011

**IN THE INTEREST OF D.H. and G.H.,
Minor Children,**

T.H., Mother,
Appellant,

M.H., Father,
Appellant.

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

A mother and father separately appeal the adjudication of their two sons,
D.H. and G.H., as children in need of assistance. **AFFIRMED.**

Rebecca G. Ruggero, Bettendorf, for appellant-mother.

Murray W. Bell of Murray W. Bell, P.C., Davenport, for appellant-father.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney
General, and Jeffrey Renander, County Attorney, for appellee State.

Sally Peck, Iowa City, attorney and guardian ad litem for minor children.

Considered by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

TABOR, J.

A mother and father separately appeal the adjudication of their two sons, D.H. and G.H., as children in need of assistance (CINA). Both parents claim the State failed to produce clear and convincing evidence that the father physically abused D.H. The parents also appeal the juvenile court orders imposing various visitation, travel, and monitoring restrictions. Accepting the juvenile court's finding that the father caused D.H.'s injuries and concluding that the dispositional order serves the best interests of the children, we affirm the CINA adjudication and corresponding conditions placed on the mother's travel and father's visitation with the children.

I. Background Facts and Proceedings

Matthew and Tricia are married and have two sons: G.H., born January 2008, and D.H., born February 2010. On April 26, 2010, D.H.'s family physician identified a healing fracture on the baby's right rib and referred him to Dr. Barbara Harre, who is certified in child-abuse pediatrics. Dr. Harre saw D.H. on April 27, 2010, and confirmed a healing fracture to the right eleventh rib. Dr. Harre also observed a more recent injury to the left eleventh rib. X-ray results confirmed that D.H.'s left eleventh and twelfth ribs were fractured. Dr. Harre also determined that D.H. had a metaphyseal "bucket" fracture to his distal left femur. In total, D.H. suffered four fractured bones, and the injuries occurred on at least two separate occasions. Dr. Harre testified the left eleventh and twelfth rib fractures were acute, indicating that D.H. suffered the injuries two to three days

before the April 27th visit. Dr. Harre also opined that the right eleventh rib fracture occurred two to four weeks earlier.

Police officer Bradley Peck and Department of Human Service (DHS) employee Dustin Krueger interviewed Matthew and Tricia twice about D.H.'s injuries. In the first interview, after Dr. Harre confirmed the right rib fracture, Matthew speculated that D.H.'s injury may have occurred when Matthew dropped D.H.'s infant seat and D.H. fell from the seat onto the floor.¹ Tricia stated she heard this accident occur from another room and saw the overturned seat. In a second interview, after Dr. Harre diagnosed the additional fractures, Matthew described two additional accidents. Matthew stated he had once fallen on the stairs while holding D.H. Matthew also recalled D.H. had once almost fallen off of the bed because G.H. was jumping on the bed, but that Matthew had grabbed D.H. by the leg to prevent him from falling. No one besides Matthew witnessed these accidents. Matthew had not told Tricia about his fall on the stairs or D.H.'s near-fall from the bed before the interviews with Peck and Krueger.

Matthew and Tricia also hypothesized that D.H. suffered his injuries as a result of Tricia's difficult delivery. After Tricia's first delivery, her doctor recommended that she deliver any future children by Caesarean section. During her pregnancy with D.H., Tricia was diagnosed with macrosomia, which means that D.H. was very large for a gestational baby. D.H. measured seven pounds, twelve ounces more than a month before Tricia's planned delivery date and

¹ In the record, this infant seat is described as a "Papasan" chair.

weighed nine pounds, ten ounces when he was born. Tricia delivered D.H. vaginally, but experienced a difficult delivery. Tricia testified that the nurses attending her delivery applied very heavy pressure to her stomach to deliver D.H. Tricia took D.H. to the doctor several times soon after his birth, concerned with his fussiness. Matthew and Tricia's expert witness, Dr. Janice Ophoven, testified that she could not rule out childbirth, metabolic bone disease, or other underlying medical problems as the cause of D.H.'s injuries.

Dr. Harre testified that twisting or pulling on an extremity causes a bucket fracture and squeezing of the chest causes rib fractures. Dr. Harre concluded that D.H.'s injuries were not incurred during his difficult birth; this determination was supported by her opinion that D.H.'s injuries occurred on at least two separate dates. In her review of D.H.'s record and her examination, Dr. Harre did not detect any genetic, bone, or nutritional abnormalities that would explain D.H.'s injuries. Dr. Harre also testified that D.H.'s injuries were not consistent with the accidents Matthew described.

Tricia stated that she did not cause D.H.'s injuries and Matthew confirmed this fact. The juvenile court found Tricia's denial credible and stated: "It is clear to the [c]ourt that she provides appropriate care to her children, seeks out medical advice when necessary and, in fact, she has strong indicators of being overly-protective of her children."

Matthew was less certain that he did not cause D.H.'s injuries. In his second interview, Matthew stated,

I can't sit here and tell you that I know that I hurt my child. I mean, I can sit and tell you that, yeah, I have been frustrated. Yeah, there's

been times where I'll squeeze him tight, you know, thinking that's gonna get him to stop, but for me to tell you that in my head, yeah, I just hurt him, I don't know that I could tell you that.

The juvenile court found Dr. Harre's testimony credible and concluded D.H.'s injuries were not accidental or caused by Tricia's difficult delivery, but resulted from abuse. The juvenile court determined Matthew fabricated his explanations for the injuries. The juvenile court concluded that, given the force required to fracture a child's ribs, Matthew would have been aware his actions were abusive and likely to cause injury to D.H.

The juvenile court also referred to a prior proceeding, where the court adjudicated G.H. as a CINA based upon a founded abuse report against Matthew after G.H. exhibited symptoms of shaken baby syndrome in June 2008.² Matthew was convicted of child endangerment and received a two-year suspended sentence. The DHS eventually returned G.H. to the custody of Matthew and Tricia.

Finding D.H. and G.H. were imminently likely to suffer harm as a result of Matthew's failure to exercise a reasonable degree of care in supervision, on January 12, 2011, the juvenile court adjudicated D.H. and G.H. as CINA based on Iowa Code sections 232.2(6)(b) and 232.2(6)(c)(2) (2009). The juvenile court concluded Tricia did not present a danger to the child, but for her potential willingness to further expose the children to their father. The juvenile court

² The court adjudicated G.H. as a CINA on June 9, 2008, after the emergency room admitted G.H. due to unresponsiveness. G.H. exhibited symptoms of shaken baby syndrome, sclera, retinal hemorrhages, subdural hemorrhages and diffused petechiae over the entire head. Matthew was custodian at the time of injury.

expressed confidence that Tricia would follow the court's orders regarding appropriate contact between the children and their father. Therefore, the court placed the children in Tricia's custody, subject to DHS supervision and provided Tricia resides in Iowa. This plan required Matthew to move out of the family home. The court required that DHS supervise any contact between Matthew and the children.

In a dispositional order on February 18, 2011, the juvenile court noted that Tricia rejected the court's conclusion Matthew had abused the children. The juvenile court detailed the case plan, which provided for DHS "drop-in" visits at Tricia's home to ensure that Matthew was not present. The order limited Matthew's contact with the children to at least two DHS supervised visits a week. The order also required both parents to meet weekly with DHS for parental counseling sessions. The order prohibited Tricia and the children from leaving the state without prior approval from the court.

At a hearing on April 4, 2011, the court considered Matthew and Tricia's separate motions pursuant to Iowa Rule of Civil Procedure 1.904(2). Tricia's motion challenged the restriction on her interstate travel, while Matthew's motion generally argued for more contact with the children and to change the location of some visits. In its order on May 2, 2011, the court permitted Tricia to travel to Illinois to attend church and any medical appointments for the children, subject to providing notice to DHS at least twenty-four hours in advance. The court denied Tricia's additional requests to travel to Illinois for the purpose of visiting relatives and purchasing groceries. The court denied Matthew's request for visitation

supervised by his parents, highlighting the importance of DHS supervision. The court also denied his request to visit the children at the family home because allowing visitation there would make it difficult for DHS to determine if the parents were abiding by the supervision restrictions. The court did provide for additional contact via Skype, a video chat service, not to exceed thirty minutes once a week, and reiterated DHS's authority to expand Matthew's weekly, supervised visits.

The parents appeal, challenging both the CINA adjudication and various restrictions in the February 18 and May 2, 2011 orders.

II. Scope and Standard of Review

We review CINA proceedings de novo. *In re K.N.*, 625 N.W.2d 731, 733 (Iowa 2001). The State bears the burden to prove its allegations by clear and convincing evidence. Iowa Code § 232.96(2). "Clear and convincing evidence" must leave "no serious or substantial doubt about the correctness of the conclusion drawn from it." *In re D.D.*, 653 N.W.2d 359, 361 (Iowa 2002) (citation omitted). We accord considerable weight to the factual findings of the juvenile court, especially concerning the credibility of witnesses, but we are not bound by those findings. *In re W.G.*, 349 N.W.2d 487, 491–92 (Iowa 1984). Our primary concern is the best interests of the children. *Id.*

III. Analysis

A. Grounds for adjudication

We first consider the argument advanced by both Matthew and Tricia that clear and convincing evidence did not exist to support the juvenile court's CINA

adjudication. The juvenile court adjudicated D.H. and G.H. as CINA pursuant to Iowa Code sections 232.2(6)(b) and 232.2(6)(c)(2). Section 232.2(6)(b) requires that a parent “has physically abused or neglected the child, or is imminently likely to abuse or neglect the child.” Section 232.2(6)(c)(2) provides that a child “has suffered or is imminently likely to suffer harmful effects as a result of . . . [t]he failure of the child’s parent . . . to exercise a reasonable degree of care in supervising the child.”

Tricia argues that Dr. Harre’s testimony was insufficient to prove Matthew caused D.H.’s injuries. Tricia asserts that Dr. Harre did not properly consider the difficult birth or other possible genetic abnormalities in reaching her conclusions. The court found Dr. Harre’s testimony credible, and did not rely on the parents’ expert witness, Dr. Uphoven, who had not examined D.H. The juvenile court believed Dr. Harre’s testimony regarding the type of injuries, the mechanism required to cause the injuries, and the date D.H. suffered the injuries. The court also credited Dr. Harre’s testimony regarding the absence of any genetic, bone, or nutritional abnormalities and the fact that Tricia’s difficult delivery had not caused D.H.’s injuries. Based upon Dr. Harre’s testimony, the court concluded that D.H.’s fractures were not accidental, but were the result of abuse.

Tricia also attacks the testimony of Officer Peck and DHS worker Krueger, who interviewed the parents after Dr. Harre diagnosed D.H. with fractured ribs. This attack does not help her argument because the juvenile court did not rely on the testimony of Peck or Krueger. Rather, the juvenile court relied directly on Peck’s recordings of the interviews with Matthew. The juvenile court observed

the witnesses and determined Matthew's explanations for D.H.'s injuries were "fabrications." Based upon Matthew's statements in the interview and his testimony, the juvenile court concluded that Matthew caused D.H.'s injuries. Therefore, the court concluded that both sons were "imminently likely to be abused by their father."

As previously stated, we accord considerable weight to the factual findings of the juvenile court, especially concerning the credibility of witnesses whom the judge sees and hears firsthand. *W.G.*, 349 N.W.2d at 491-92. The juvenile court made several explicit findings relating to witness credibility and we defer to these determinations. We also agree that Matthew's aggression poses a risk not only to D.H., but also to G.H., and this risk justifies the CINA adjudication of both boys. We have no "serious or substantial" doubt that the juvenile court reached the correct decision. The State has proved by clear and convincing evidence that Matthew caused D.H.'s injuries and that both boys are imminently likely to suffer harm as a result of Matthew's failure to exercise a reasonable degree of care in supervising the children, justifying the CINA adjudication.

B. Evidence of past acts

Both parents argue the juvenile court erred in considering the 2008 CINA adjudication involving Matthew and G.H. The parents cite Iowa Rule of Evidence 5.404(b), which provides as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

But “evidence meeting the test of relevancy and materiality in a CINA proceeding may be . . . admitted and relied upon in a termination proceeding to the extent of its probative value.” *In re E.J.R.*, 400 N.W.2d 531, 532 (Iowa 1987). Our court applied this principle to allow evidence from a prior termination proceeding at a later CINA hearing involving a different child. *In re C.M.*, 526 N.W.2d 562, 565 (Iowa Ct. App. 1994). We believe this principle also permits the admission of material, relevant evidence from a prior CINA adjudication at a later CINA hearing. Furthermore, juvenile courts are “authorized to judicially notice the pleadings and exhibits from previous CINA proceedings involving the same child or children.” *In re A.M.H.*, 516 N.W.2d 867, 873 (Iowa 1994).

Evidence of a previous, founded abuse report against Matthew after G.H. exhibited symptoms of shaken-baby syndrome in June 2008 is relevant and material to the decision to again adjudicate G.H. as a CINA and is therefore admissible. In addition, because the best interests of the children are our primary concern, we attempt to divine what the future holds for them if returned to their parents. “Insight for this determination can be gained from evidence of the parent’s past performance, for that performance may be indicative of the quality of the future care that parent is capable of providing.” *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981).

Even if the juvenile court erroneously admitted the evidence, the error was harmless. Iowa Rule of Evidence 5.103(a) provides “[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.” See, e.g., *In re T.C.*, 492 N.W.2d 425, 429–30

(Iowa 1992) (stating that admission of evidence of father's juvenile criminal record in termination proceeding was harmless error); see also *In re N.M.W.*, 461 N.W.2d 478, 480–81 (Iowa Ct. App. 1990) (holding that the court may consider evidence from prior CINA proceeding as long as other clear and convincing evidence independent of the prior CINA proceedings existed). In this case, our de novo review confirms that independent evidence existed in the record to support D.H.'s CINA adjudication, and therefore the admission of the 2008 founded abuse report did not affect Matthew's rights or lead to prejudice. For these reasons, we do not find the court's consideration of Matthew's 2008 founded abuse report to be grounds for reversal.

C. Due process right

Tricia argues that the court's original adjudicatory order eliminated any State interest in her right to the care and control of her children. She bases this argument on the due process rights provided by the United States Constitution in amendments V and XIV and by the Iowa Constitution in article I section 9. As our supreme court has stated, "[t]he right of a parent to companionship, care, custody, and management of his or her children has been recognized as 'far more precious . . . than property rights.'" *A.M.H.*, 516 N.W.2d at 870 (citation omitted). Accordingly, a parent has due process rights relating to a CINA proceeding. *Id.* "[T]he substantive dimension of due process dictates that where a fundamental right is involved, regulations limiting the right may be justified only by a compelling state interest, and must be narrowly drawn to express only the legitimate state interest at stake." *In re D.J.R.*, 454 N.W.2d 838, 844 (Iowa

1990). “[S]ubstantive due process is reserved for the most egregious governmental . . . abuses that ‘shock the conscience or otherwise offend . . . judicial notions of fairness . . . [and that are] offensive to human dignity.’” *In re K.M.*, 653 N.W.2d 602, 607 (Iowa 2002) (citation omitted).

We recognize Tricia’s fundamental right to parent D.H. and G.H. But we must balance this right with the State’s compelling interest in protecting D.H. and G.H. from harm. The original adjudicatory order stated, “[t]here is no evidence that the child’s mother presents a danger to the child, *but for her potential willingness to further expose the children to their father.*” (Emphasis added.) In its dispositional order, the juvenile court considered Tricia’s due process right and detailed its reasons for restricting Tricia’s control of her children. The court again stated, “the only danger that Tricia . . . presents to her children is the potential likelihood that she will expose her children to an inappropriate caregiver, Matthew . . ., without court involvement.” The court instituted the “drop-in” DHS visits and Illinois travel restriction to minimize this danger by making it more difficult for Tricia to expose the children to Matthew. The court also ordered Tricia to attend weekly parenting classes with Matthew, recognizing that Tricia would benefit from learning how to deal with his anger-management issues.

The juvenile court’s holding—that Tricia does not personally present a danger to the children—did not eliminate the State interest in the safe parenting of her children. It merely defined the danger, allowing the court to tailor an appropriate remedy. Although Tricia may not present a direct risk of harm to the

children, her willingness to allow Matthew to visit the children without DHS supervision does pose a threat. Tricia's testimony showed her continued loyalty to Matthew despite his physical abuse of their sons. In response to this threat, the court dictated narrow restrictions on Tricia's freedom to parent. Considering both Tricia's rights and the compelling interest of the State, we find the court's restrictions appropriate. Prohibiting Tricia from unrestrained travel to Illinois, requiring DHS supervision of all visits, and requiring Tricia to attend classes with Matthew do not offend judicial notions of fairness. We affirm the out-of-state travel restrictions, the DHS supervision requirements, and the weekly parenting class requirement.

D. Case plan restrictions

Matthew seeks a reversal of the order removing D.H. and G.H. from his custody. To support his argument, Matthew cites Iowa Code section 232.102(5), which states that, whenever possible, the court should permit a child to remain in the child's own home with the child's parents. This code provision does not support Matthew's position, as D.H. and G.H. have remained in their family home with their mother. Furthermore, section 232.102(5) allows the court to transfer custody if the child cannot be protected from physical abuse, as is the case here.

Matthew further argues that the court should not have removed the children from his custody because Tricia could supervise Matthew's interactions with the children. We reject this argument; Tricia was unable to prevent Matthew from injuring D.H. in the past. Although Tricia may make best efforts to fully supervise Matthew's interactions with the children, if Matthew were allowed to

remain in the family home, this arrangement would inevitably allow Matthew to spend unsupervised time with the children. We agree with the juvenile court's decision to remove D.H. and G.H. from Matthew's custody.

Matthew also challenges the requirement that DHS supervise all of his visitation with the children. He argues that the court should allow him to visit the children under the supervision of their grandparents. He bases his argument on Iowa Code section 232.102(7), which provides:

If the court orders the transfer of custody to the department of human services or to another agency for placement in group foster care, the department or agency shall make every reasonable effort to place the child in the least restrictive, most family-like, and most appropriate setting available

Matthew cites several cases applying this concept. But this provision does not apply to Matthew; it applies only when the court transfers custody of a child to the DHS or another agency. The court did not transfer custody of D.H. and G.H., but allowed Tricia to retain custody in the family home.

Even if the requirement applied in this case, we find that efforts by the juvenile court and DHS to facilitate reunification were reasonable. The juvenile court concluded that DHS supervision was necessary to ensure the safety of the children and monitor progress. The juvenile court had legitimate concerns that allowing Matthew's parents to supervise his visitation would not adequately protect the children; DHS supervision was prudent. Matthew is allowed at least two weekly supervised visits and additional Skype visitation. These visits provide Matthew with ample opportunity to demonstrate his ability to appropriately care for his children, and are therefore reasonable.

Tricia argues the juvenile court did not make the least restrictive disposition appropriate considering all the circumstances of the case, as required by Iowa Code section 232.99(4). Tricia contends that prohibiting Matthew from visiting the boys when any other family or friends are present is unduly restrictive. Because we find no such prohibition in the juvenile court's orders, we do not consider this particular claim. Tricia also contends the juvenile court order preventing Matthew from visiting the children in the family home and prohibiting anyone besides DHS from supervising his visits is unduly restrictive and fails to move the family toward reunification. Generally, one parent lacks standing to assert an argument on behalf of the other parent. *In re K.R.*, 737 N.W.2d 321, 323 (Iowa Ct. App. 2007). But to the extent that Tricia is arguing that restrictions on Matthew's visitation do not allow their family to "remain intact," we entertain her claim.

Section 232.100 describes the least restrictive disposition available: a "suspend[ed] judgment . . . subject to terms and conditions imposed to assure the proper care and protection of the child." Section 232.101 describes the next least restrictive disposition: retention of custody by a parent "subject to terms and conditions which the court prescribes to assure the proper care and protection of the child." The dispositional order states that placing the children in Tricia's custody is the "least restrictive alternative to resolve the problems of the children and the family while minimizing the risk for adjudicatory harm to the children." We agree with this statement. In accordance with the court's determination that Matthew is currently unable to exercise a reasonable degree of care in

supervising his children, allowing Matthew to visit the children without DHS supervision would place the children at risk. The terms and conditions set by the court are appropriate to protect the children and are not unduly restrictive.

We find the parents' arguments relating to the dispositional restrictions unpersuasive and affirm the juvenile court on all counts.

E. Re-opening of the record

Tricia argues the juvenile court erred in allowing the State to reopen the record to call Dr. Harre after the close of the parents' case on October 5, 2010. Tricia asserts that the State got "two bites at the apple." But the State did not call Dr. Harre on October 19, 2010. Rather, Sally Peck, guardian ad litem for the children, called Dr. Harre. The court discussed the plan to hold the record open with all parties at the close of the October 5, 2010 hearing. The court did not "close" and "reopen" the record but rather held it open until Attorney Peck was able to recall Dr. Harre for further testimony. Furthermore, a trial court has wide discretion to receive additional evidence. Iowa R. Civ. P. 1.920; *Moser v. Stallings*, 387 N.W.2d 599, 603 (Iowa 1986). The court did not abuse its discretion by holding the record open until the guardian ad litem could recall Dr. Harre.

AFFIRMED.