

IN THE COURT OF APPEALS OF IOWA

No. 8-198 / 08-0217

Filed April 9, 2008

**IN THE INTEREST OF A.F., D.F., P.F., JR., AND J.F.,
Minor Children,**

**K.A.S., Mother,
Appellant.**

Appeal from the Iowa District Court for Lyon County, Robert J. Dull,
District Associate Judge.

A mother appeals from the juvenile court order adjudicating her children to
be in need of assistance. **AFFIRMED IN PART, REVERSED IN PART.**

Randy L. Waagmeester of Waagmeester Law Office P.L.C., Rock Rapids,
for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney
General, and Carl Petersen, County Attorney, for appellee.

Missy Clabaugh of Jacobsma, Clabaugh & Freking, P.L.C., Sioux Center,
for father.

Melinda Roman, Sibley, guardian ad litem for minor children.

Considered by Mahan, P.J., and Eisenhauer and Baker, JJ.

EISENHAUER, J.

A mother appeals from the juvenile court order adjudicating her children to be in need of assistance (CINA) pursuant to Iowa Code sections 232.2(6)(b) and (c)(2) (2007). She contends the State failed to prove by clear and convincing evidence the allegations in the CINA petition, the court improperly admitted evidence, and that the children should be returned to her care. We review these claims de novo. *In re C.H.*, 652 N.W.2d 144, 147 (Iowa 2002).

Prior to this juvenile court proceeding the parents were involved in a contentious dissolution of their marriage. Pursuant to the dissolution of marriage decree the children are in the physical care of their mother. The parents have fought over allegations of delinquent child support and domestic abuse. After a visit with the father in late May 2007 the children were not returned to their mother. No removal order was obtained. An adjudication hearing was held on July 11, 2007, and on the same date an order was entered placing the children in the "care custody and control" of the Iowa Department of Human Services for placement in "relative/foster care." The order was entered pursuant to agreement of the parties at the close of the adjudication hearing and made no findings that the children were in imminent danger to their life or health if allowed to remain in their mother's custody. The children were adjudicated CINA by an order entered on August 29, 2007. After an aborted appeal, a disposition hearing was held on January 25, 2008, and the children were confirmed to be in need of assistance and their custody was continued with DHS for placement with the father. They have resided with the father since May 2007. Concurrent

jurisdiction was granted to the district court to permit the parents to litigate a possible modification of the dissolution decree.

The CINA petition was filed following allegations in May 2007 that the mother had struck two of the four children with enough force to leave bruises. Based on their appearance, a child abuse investigator determined the bruises were made while the children were in the mother's care. During separate interviews with the investigator and a Child Advocacy Center worker, the children stated their mother had struck them and told them not to tell anyone. The children stated their mother hits all the children.

A child is in need of assistance is a child "[w]hose parent, guardian, other custodian, or other member of the household in which the child resides has physically abused or neglected the child, or is imminently likely to abuse or neglect the child." Iowa Code § 232.2(6)(b). The mother contends the State failed to prove by clear and convincing evidence that the injuries suffered by the children were sufficient enough to support a finding of physical abuse or neglect. She argues that even if the marks were caused by the mother, they were "reasonable corporal punishment."

The credible evidence supports a finding the mother inflicted the bruises found on two of the children. The evidence is supported by testimony of two expert witnesses. The children's testimony on this point was consistent. Furthermore, the injuries inflicted cannot be found to be reasonable corporal punishment.

Our statutory and case law do provide that parents have a right to inflict reasonable corporal punishment in rearing their children. However, a parent must not punish with undue severity or cruelty, or only because he is angered with the child and thereby gratifies

his own aroused passions. In determining whether the punishment crosses the line from corrective to abusive, the court looks at the amount of force used while taking into account the child's age, physical condition, and other characteristics as well as with the gravity of the child's misconduct.

In re B.B., 598 N.W.2d 312, 315-16 (Iowa Ct. App. 1999) (citations omitted).

Here, the children were struck with enough force to leave bruises, one of which lasted in excess of one week. P.F., eight, stated his mother had angrily slapped him on the shoulder leaving a hand-shaped bruise. A.F. was struck with a vacuum cleaner hose after the vacuum cleaner fell down the stairs. When she took the cleaner to the mother, the mother hit her with the hose leaving a bruise on her thigh. The severity of the force used is disproportionate to the misconduct that is being corrected. Because the punishment crosses the line from corrective to abusive, the children were properly found to be in need of assistance pursuant to section 232.2(6)(b).

The mother argues that even if she is found to have physically abused two of the children, there is not clear and convincing evidence that the other two children are in need of assistance. We disagree. The children testified that the mother hit all four children. The facts before us support the conclusion the mother was imminently likely to abuse all four children. Our juvenile statutes are preventive as well as remedial. *In re L.L.*, 459 N.W.2d 489, 494 (Iowa 1990). Ordinarily, all siblings are at risk when one child has been abused. See *In re A.B.*, 492 N.W.2d 446, 447 (Iowa Ct. App. 1992).

The mother next contends the court improperly admitted hearsay evidence that was prejudicial. The evidence in question consists of a Department of Human Services report, two hospital reports, and two photographs of P.F.'s

injuries. These documents were admissible pursuant to Iowa Code section 232.96(6), which states:

A report, study, record, or other writing or an audiotape or videotape recording made by the department of human services, a juvenile court officer, a peace officer or a hospital relating to a child in a proceeding under this division is admissible notwithstanding any objection to hearsay statements contained in it provided it is relevant and material and provided its probative value substantially outweighs the danger of unfair prejudice to the child's parent, guardian, or custodian. The circumstances of the making of the report, study, record or other writing or an audiotape or videotape recording, including the maker's lack of personal knowledge, may be proved to affect its weight.

The evidence contained in the objected to exhibits was clearly relevant and material and its probative value exceeds any unfair prejudice to the mother.

Finally, the mother contends the court erred in not returning the children to her care following the dispositional hearing as that would be the least restrictive disposition appropriate under the circumstances. Iowa Code § 232.99(4). We note there was never a finding that the children were in imminent danger to their life or health before they were placed with their father. Our de novo review reveals no evidence at the time of disposition that they would suffer some harm contemplated by the code if returned to the mother's care. The order acknowledged a recommendation by the DHS that the children be returned to the mother at the end of the current school year if concurrent litigation does not resolve the custody issue. In its ruling, the court notes, "None of the service providers consider the physical safety of the children to be a concern." Because safety is no longer a concern, the least restrictive placement would be to return the children to the mother's care.

We affirm the district court's order adjudicating the children to be in need of assistance. We reverse the dispositional order and order the children be returned to the mother's care.

AFFIRMED IN PART, REVERSED IN PART.