

IN THE COURT OF APPEALS OF IOWA

No. 8-955 / 08-1520
Filed December 31, 2008

**IN THE INTEREST OF A.R., J.R., and P.R.,
Minor Children,**

**P.R., Minor Child,
Appellant,**

**J.L.R., Mother,
Appellant,**

**J.O.R., Father,
Appellant.**

Appeal from the Iowa District Court for Polk County, Constance Cohen,
Associate Juvenile Judge.

A mother, father, and minor child appeal separately from juvenile court
removal, adjudicatory, and dispositional orders. **AFFIRMED ON ALL APPEALS.**

Lynn C.H. Poschner of Borseth Law Offices, Altoona, for appellant-minor
child.

Ronald R. Reiper, Des Moines, for appellant-mother.

Trever Hook of Hook Law Firm, West Des Moines, for appellant-father.

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

John Jellineck, Des Moines, for J.R.

Christine Bisignano, Windsor Heights, guardian ad litem for J.R.

Alexandra M. Nelissen of Nelissen & Juckette, P.C., Des Moines, guardian
ad litem for P.R.

Nicole Garbis Nolan, guardian ad litem for A.R.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

MILLER, J.

June and Jeffrey O. are the parents of eighteen-year-old James, seventeen-year-old Ashley, thirteen-year-old Paige, and eleven-year-old Jeffrey D. June, Jeffrey O., and Paige appeal separately from juvenile court orders removing Paige and Jeffrey D. from June and Jeffrey O.'s physical custody, adjudicating them as children in need of assistance (CINA), and placing them in the temporary legal custody of the Iowa Department of Human Services (DHS) for placement in foster care.¹

I. BACKGROUND FACTS AND PROCEEDINGS.

James and Ashley were born during June's first marriage to their biological father, Richard. After an acrimonious divorce from Richard, June married Jeffrey O. and gave birth to two children, Paige and Jeffrey D. Jeffrey O. adopted James and Ashley in 1999 following Richard's voluntary termination of his parental rights.

In mid-July 2005, June called Richard sobbing and asked him to meet her at a park. When he arrived at the park, June informed him that Ashley had told her that Jeffrey O. was sexually abusing her. Richard instructed her to report the abuse to the police, but June refused because she was afraid Jeffrey O. would "throw [her] out and take [her] kids." Richard reported the abuse to the police the following day. Later that same day, a detective and a representative from DHS interviewed Ashley, June, and Jeffrey O. at their home. Outside the presence of

¹ We note that neither June nor Jeffrey O. appeal the removal, adjudication, or disposition of Ashley. We also note that although James was seventeen when the CINA proceedings were initiated, the State chose not to file a petition alleging he was a CINA.

her parents, Ashley denied that Jeffrey O. had sexually abused her. June also denied any knowledge of Ashley being sexually abused by Jeffrey O. A subsequent child protective assessment resulted in an unfounded child abuse report.

In March 2008, Ashley's cousin and his girlfriend brought her to the Polk County Sheriff's Office. She told the police that Jeffrey O. had been sexually abusing her since she was eleven years old. She stated "it started out that he would rub her with oil and insert his fingers into her." He would also masturbate in front of her and fondle her while doing so. She thought such behavior was normal at the time. Ashley stated that in 2005, Jeffrey O. admitted to her "that what he was doing was wrong." She reported the abuse to June, who told her that her allegations "would result in the family splitting up." Jeffrey O. threatened to kill himself "or get [Ashley] kicked out of the house" if she told anyone about the abuse. When the allegations were investigated by the police and DHS in 2005, Ashley was "scared and tried to blame everything on her real dad so her step-dad would not get in trouble."

The sexual abuse escalated after the 2005 investigation. Ashley told the police that Jeffrey O. began forcing her to engage in oral sex and sexual intercourse with him. She said that most of their encounters occurred in the computer room of the family's home next door to her brother James's room. According to Ashley, Jeffrey O. kept condoms in the ceiling tiles in the computer room. He would then have her put the used condoms in the "burn barrel." On

one occasion after they had sexual intercourse in the fall of 2007, he “took her on a ride and threw the condom in the ditch.”

June denied Ashley’s allegations when she was informed of them by the police. She told them “that Ashley is prone to lie” and “that she has asked Ashley a million and 10 times since the accusations were made if your dad has ever touched you and she told me no.” She wanted Ashley to submit to medical and polygraph examinations. June did not want to see Ashley and contemplated “sign[ing] her over to DHS ‘right now.’”

Ashley, Paige, and Jeffrey D. were removed from their parents’ physical custody after Ashley’s report to the police. Ashley was placed in the home of a member of her church while Paige and Jeffrey D. were placed with their maternal grandmother. An order was entered prohibiting Jeffrey O. from having any contact with his minor children.

Several days after Ashley went to the police station, a detective had her take him to the location where she thought Jeffrey O. had thrown out the used condom. The detective was “about 50 yards from Ashley . . . when [he] saw Ashley jump up and down and yell, ‘I found it. I found it.’” The condom was covered with snow and dirt. Subsequent DNA testing revealed that Jeffrey O.’s DNA was present on the condom. Jeffrey O. was arrested and charged with sexual abuse in the third degree. June posted bond for him, and he returned to live in the family’s home.

A combined removal and adjudicatory hearing was held over the course of several months. After hearing many hours of testimony, the juvenile court

entered detailed orders in August 2008 finding clear and convincing evidence existed supporting the children's removal from their parents' physical custody and adjudicating them as children in need of assistance pursuant to Iowa Code sections 232.2(6)(c)(2) and 232.2(6)(d) (2007). In September 2008, the court entered a dispositional order continuing the out-of-home placement of Ashley and modifying the placement of Paige and Jeffrey D. by removing them from their maternal grandmother's home and placing them in the temporary legal custody of DHS for placement in family foster care. June, Jeffrey O., and Paige each appeal the juvenile court's removal, adjudicatory, and dispositional orders.²

II. SCOPE AND STANDARDS OF REVIEW.

Our review of child in need of assistance proceedings is *de novo*. We review both the facts and the law, and we adjudicate rights anew. Although we give weight to the juvenile court's factual findings, we are not bound by them. As in all juvenile proceedings, our fundamental concern is the best interests of the child.

In re K.N., 625 N.W.2d 731, 733 (Iowa 2001) (citations omitted).

III. MERITS.

A. Removal.

The appellants first challenge the issuance of the *ex parte* removal order and the subsequent order affirming the removal of Paige and Jeffrey D. from their parents' home. We need not and do not address their challenge to these orders because custody of the children was placed with DHS under the juvenile court's subsequent dispositional order. Any error in granting the removal order cannot

² Although June, Jeffrey O., and Paige filed separate appeals from the juvenile court's orders, they raise the same issues on appeal with the exception that the issues raised by Paige concern only herself while the issues raised by June and Jeffrey O. concern both Paige and Jeffrey D. We will accordingly address their issues together.

now be remedied. *In re A.M.H.*, 516 N.W.2d 867, 871 (Iowa 1994). “We cannot go back in time and restore custody based on alleged errors in the initial removal order.” *Id.*

B. Adjudication.

The appellants next claim the record does not contain clear and convincing evidence that Paige and Jeffrey D. are CINA as defined in sections 232.2(6)(c)(2) or 232.2(6)(d). The State bears the burden of proving CINA allegations by clear and convincing evidence. Iowa Code § 232.96(2). “Clear and convincing evidence is evidence that leaves 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). The appellants argue the State did not prove Paige and Jeffrey D. were CINA under sections 232.2(6)(c)(2) or 232.2(6)(d) because “there are no allegations of sexual abuse perpetrated against [Paige] or [Jeffrey D.] and no allegations that [they] were not properly supervised.” We do not agree.

Sections 232.2(6)(c)(2) and 232.2(6)(d) provide:

“Child in need of assistance” means an unmarried child:

. . . .
c. Who has suffered or is *imminently likely* to suffer harmful effects as a result of . . .

. . . .
(2) The failure of the child’s parent . . . to exercise a reasonable degree of care in supervising the child.

d. Who has been, or is *imminently likely* to be, sexually abused by the child’s parent

(Emphasis added.)

“Although every CINA adjudication addresses a unique situation, facts in prior cases suggest that perpetrators of sexual abuse often abuse multiple children in the family” *D.D.*, 653 N.W.2d at 362. “Prior decisions likewise reflect the common sense notion that, ordinarily, all siblings are at risk when one child has been sexually abused.” *Id.* There is clear and convincing evidence present in the extensive record that Jeffrey O. sexually abused Paige’s and Jeffrey D.’s sister Ashley.

The juvenile court found, and we agree, that Ashley’s account of Jeffrey O.’s sexual abuse of her was credible and supported by other evidence in the record. *A.M.H.*, 516 N.W.2d at 870 (stating weight should be given to the juvenile court’s findings regarding the credibility of witnesses). Ashley was able to provide a detailed and consistent description of the sexual abuse she endured over the course of eight years. In addition, the police were able to locate a condom with Jeffrey O.’s DNA present on it in the location Ashley recalled he threw it after having sexual intercourse with her. The police also interviewed a friend of Ashley’s who informed them that while she was on the phone with Ashley one night in February 2008 she overheard an individual she believed to be Jeffrey O. “tell Ashley something to the effect of ‘We’re gonna have sex tonight’ or some other sexual comment.”

In light of the foregoing, we reject the appellants’ argument that Paige and Jeffrey D. are not CINA under sections 232.2(6)(c)(2) or 232.2(6)(d), because there were no allegations that Jeffrey O. sexually abused them. See, e.g., *In re E.B.L.*, 501 N.W.2d 547, 548 (Iowa 1993) (father allegedly sexually abused older

daughter and all six children adjudicated CINA); *In re A.B.*, 492 N.W.2d 446, 447 (Iowa Ct. App. 1992) (court ordered CINA petition to be filed as to all children after allegations of sexual abuse of one child). Our statutory CINA provisions are “preventative as well as remedial.” *In re L.L.*, 459 N.W.2d 489, 494 (Iowa 1990). “They are designed to prevent probable harm to the child and do not require delay until after harm has occurred.” *Id.* We likewise reject their argument that Paige and Jeffrey D. are not CINA under those sections because there were no allegations that they were not properly supervised.

June’s adamant refusal to believe her husband sexually abused Ashley impacts her ability to protect Paige and Jeffrey D. from similar abuse. She agreed in response to a question asked of her during cross-examination that nothing anybody could tell her would change her opinion that Ashley fabricated the sexual abuse allegations. June went to great lengths to refute Ashley’s allegations, “preposterous[ly]” hypothesizing at one point during the case that

Ashley broke into [June and Jeffrey O.’s] locked bedroom, fished a used condom out of the wastebasket, somehow wiped [June’s] DNA off the condom, planted her own DNA onto the condom, and then led the police to the condom she “planted” in the ditch in an effort to frame her father.

June’s steadfast support of Jeffrey O. in the face of seemingly insurmountable evidence corroborating Ashley’s allegations supports the juvenile court’s conclusion that Paige and Jeffrey D. would be imminently likely to be sexually abused by Jeffrey O. if they were not adjudicated CINA. June failed to protect Ashley from further sexual abuse after Ashley informed her of it in 2005. There is nothing present in the record to suggest that her response would be any

different if Jeffrey O. were to start abusing Paige or Jeffrey D. in the future. See *In re T.B.*, 604 N.W.2d 660, 662 (Iowa 2000) (“The future can be gleaned from evidence of the parents’ past performance and motivations.”). This leads us to the appellants’ final claim concerning the juvenile court’s dispositional order.

C. Disposition.

In its September 2008 dispositional order, the juvenile court removed Paige and Jeffrey D. from their maternal grandmother’s home and placed them in the temporary legal custody of DHS for placement in family foster care upon finding that “it is more than possible that [the maternal grandmother] is allowing prohibited contact between June and Jeffrey and their children.” The court further found the children were at “risk of further adjudicatory harm” because “no one in the family believes the sexual abuse occurred or feels that June . . . failed to protect Ashley.” The appellants challenge this order, arguing it was not the least restrictive disposition available because “there were no allegations of continued abuse to children [Paige] and [Jeffrey D.] while in their maternal grandmother’s care.”

Iowa Code section 232.99(4) requires the juvenile court to “make the least restrictive disposition appropriate considering all the circumstances of the case” upon conclusion of the dispositional hearing. The home of a relative is considered less restrictive than placement with DHS. See Iowa Code §§ 232.99(4); .102(1); *In re N.M.*, 528 N.W.2d 94, 97 (Iowa 1995) (stating chapter 232 favors relative placements over nonrelative placements). However, Paige

and Jeffrey D.'s continued placement with their maternal grandmother was not appropriate given the circumstances of this case.

We find, like the juvenile court, that the maternal grandmother was not truthful about where she, Paige, and Jeffrey D. spent the evening before the final day of the dispositional hearing. She testified they spent the night at James's apartment. James, however, testified that no one was present at his apartment that night aside from himself and his roommates. It is likely given the evidence presented at the dispositional hearing that the maternal grandmother was allowing Paige and Jeffrey D. to have prohibited contact with their parents, especially considering her testimony that she did not believe Ashley's allegations of sexual abuse. There was also evidence that the maternal grandmother exposed Paige and Jeffrey D. to June's sister's husband, a registered sex offender, without concern for their safety. We thus agree with the juvenile court that it was not in the children's best interests to remain in their maternal grandmother's care. See *In re E.H.*, 578 N.W.2d 243, 248 (Iowa 1998) (stating our overriding consideration is the best interest of the children).

IV. CONCLUSION.

Upon our de novo review, we conclude that Paige and Jeffrey D. are CINA as defined in Iowa Code sections 232.2(6)(c)(2) and 232.2(6)(d). We further conclude their placement with DHS was the least restrictive disposition available under section 232.99(4) given the circumstances present in this case. The judgment of the juvenile court is accordingly affirmed.

AFFIRMED ON ALL APPEALS.