

IN THE COURT OF APPEALS OF IOWA

No. 9-312 / 09-0198
Filed May 29, 2009

**IN THE INTEREST OF B.N. and C.N.,
Minor Children,**

**K.J.N., Father,
Appellant.**

Appeal from the Iowa District Court for Linn County, Susan Flaherty,
Associate Juvenile Judge.

A father appeals from the juvenile court's order finding his son is a child in
need of assistance. **AFFIRMED.**

Mark Meyer and Jon Kinnamon, Cedar Rapids, for appellant father.

Jessica Wiebrand, Cedar Rapids, for appellee mother.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney
General, Harold Denton, County Attorney, and Lance Heeren, Assistant County
Attorney, for appellee State.

Dawn Wilson, Cedar Rapids, for minor children.

Considered by Miller, P.J., and Eisenhauer and Mansfield, JJ.

MANSFIELD, J.

This is a child in need of assistance case. K.N. appeals from that portion of the juvenile court's order finding that his son, B.N., is a child in need of assistance (CINA).

The genesis of this case occurred in May 2008. K.N. and his wife had adopted two foster children in 2001 and 2002 respectively: C.N., a girl who is now fourteen, and B.N., a boy who is now nine. C.N. has been in some respects a difficult child. The record shows that she has ADHD, atypical behaviors, and a low average IQ in the 85-88 range. As can be seen from the DVD of her interview, although she is fourteen years old, she functions at approximately a third grade level. B.N. seems to be better adjusted and has had fewer issues.

In early May 2008, C.N. was overheard telling a classmate that K.N. had inappropriately touched her. The Iowa Department of Human Services investigated and, in the interim, C.N. was placed at a youth shelter, and B.N. was placed with K.N.'s parents.

In a recorded interview with a forensic interviewer, C.N. stated that K.N. had touched her inappropriately on several occasions. She also described an incident that occurred right after Memorial Day the previous year (interestingly, the recorded interview occurred right after Memorial Day in 2008) where K.N. had asked her to get into the shower with him, took her hand, made her rub his penis, and then ejaculated. C.N.'s recounting of this incident has been consistent and detailed. K.N. and his wife strongly deny the incident or any other inappropriate touching ever occurred.

After determining C.N.'s reports of sexual abuse to be founded, the State commenced this CINA proceeding. Following a hearing on October 1, 3, and 16, 2008, the juvenile court found C.N. and B.N. to be CINA. Notably, K.N., who was being investigated for possible criminal prosecution, declined to testify at the hearing. C.N. did not testify either; rather, the State relied on the DVD of her late May 2008 interview. The CINA determinations were based on Iowa Code sections 232.2(6)(c)(2) ("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"), 232.2(6)(d) (a child "[w]ho 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"), and, as to C.N. only, 232.2(6)(k) (a child "[w]hose parent, guardian, or other custodian for good cause desires to be relieved of the child's care and custody").

In the view of the juvenile court, the critical issue at the hearing was the credibility of C.N.'s statements reporting sexual abuse by her father. The court found those statements to be credible. The court also gave some weight to evidence that C.N. had undergone sexual penetration and the fact that C.N. had recently added an allegation of sexual intercourse to her reports concerning K.N.

K.N. now appeals. K.N. does not challenge the juvenile court's order as regards C.N., and both K.N. and his wife agree that for behavioral reasons alone, they no longer wish to be responsible for C.N.'s care and custody. K.N. does, however, challenge the order as regards B.N.

We review CINA cases *de novo*. *In re D.D.*, 653 N.W.2d 359, 361 (Iowa 2002). Although not bound by the juvenile court's factual findings, we give them

weight, especially when considering the credibility of witnesses. *Id.*; *In re D.T.*, 435 N.W.2d 323, 329 (Iowa 1989). “The most important consideration in any CINA case is the best interests of the child.” *D.D.*, 635 N.W.2d at 362.

On appeal, K.N. argues that the juvenile court erred in finding clear and convincing evidence that he had sexually abused C.N. Alternatively, he argues that even a finding that he sexually abused C.N. should not result in a determination that B.N. is a CINA.

This is a difficult case. On the recorded interview, C.N. yawns and stretches frequently and often looks away from the camera. It is very obvious that she does not function at a normal intellectual or emotional level for someone her age. Yet, DHS and the juvenile court both found her to be credible, particularly because of the degree of detail and consistency in her story, and ultimately we do as well.

At the hearing, K.N. introduced evidence that he did not have the opportunity to have sexually abused C.N., and that because of certain medication he was not capable of an erection. K.N. also introduced testimonials as to his good character from various sources. Some of the force of this evidence and testimony is drained, however, by the fact that K.N. himself declined to testify at the hearing. Of course, it is the right of K.N. not to testify, but in a civil proceeding such as this we may draw an inference from this fact. *Conkling v. Conkling*, 185 N.W.2d 777, 784 (Iowa 1971).

Alternatively, K.N. contends that the finding with respect to C.N. does not support a determination that son B.N. is a CINA. However, we agree with the juvenile court’s decision here as well. The juvenile court quoted and relied upon

In re D.D., 653 N.W.2d 359 (Iowa 2002), where the supreme court held that a finding that a father had engaged in a highly inappropriate sexual episode with his daughter could support a section 232.2(6)(d) CINA determination regarding the son as well. Although the supreme court also reminds us that “every CINA adjudication addresses a unique situation,” *id.* at 362, we believe the juvenile court correctly found that B.N., a young child of nine, also needs the protection of CINA status at this time given the factual finding that K.N. sexually abused his older sister. We note that on his recorded interview, B.N. does appear to have been coached by K.N. and/or his family, a point that perhaps highlights B.N.’s vulnerability. Thus, we find that B.N.’s best interests are served by adjudicating him a child in need of assistance.

Accordingly, we affirm the decision of the juvenile court.

AFFIRMED.