

IN THE COURT OF APPEALS OF IOWA

No. 1-327 / 91-108

FILED

SEP 24 1991

CLERK SUPREME COURT

IN THE INTEREST OF Z.M., V.M., and L.M., Minor Children,

R.M.,

Father-Appellant,

303

H.M.,

Mother of V.M. and L.M., Appellant.

Appeal from the Iowa District Court for Appanoose County, Gene W. Glenn, Juvenile Court Referee.

The natural father of Z.M. and the natural mother of V.M. and L.M. appeal a judgment of the district court, juvenile division, finding the minor children were in need of assistance. **AFFIRMED.**

Kevin S. Maughan of Clements, Pabst, Hansen & Maughan, Albia, for appellant mother H.M.

Eric Palmer of Palmer & Palmer, Oskaloosa, for appellant father R.M.

Bonnie J. Campbell, Attorney General, John Parmeter, Assistant Attorney General, and Judy Sheirbon, Assistant Attorney General.

Considered by Schlegel, P.J., and Hayden and Habhab, JJ.

HAYDEN, J.

In October 1989 nine-year-old A.B., the half sister of the children at issue in this case, made statements to classmates and a child abuse investigator indicating her stepfather, R.M., had sexually abused her on more than one occasion. A.B. stated R.M. forced her to perform oral sex on him and he fondled her genitals. When the child abuse investigator visited the family home, the mother, H.M., signed a voluntary agreement placing A.B. in foster care. A sexual abuse examination performed on A.B. was consistent with the type of abuse A.B. described. In addition, a red mark on A.B.'s upper thigh was discovered during the examination which A.B. indicated was caused by H.M. hitting her with a strap. H.M. admitted using the strap on A.B. but stated she was punishing A.B.

A child abuse investigation report was filed with the court finding A.B. had been sexually abused by her stepfather and physically abused by her mother. A.B. was removed from the home and adjudicated a child in need of assistance (CINA). In A.B.'s adjudication order the court directed an amended petition be filed alleging the remaining children in the home, Z.M., V.M., and L.M. were children in need of assistance.

An adjudication hearing regarding Z.M., V.M., and L.M. was held. On May 31, 1990, the juvenile referee entered its order finding the remaining children were in need of assistance pursuant to Iowa Code section 232.2(6)(c)(2).

The referee determined removing the children from the home was necessary based on R.M.'s denial of sexually abusing A.B., H.M.'s refusal to believe the sexual abuse had occurred, and H.M.'s lack of a protective attitude regarding Z.M., V.M., and L.M.

Following a dispositional hearing on December 6, 1990, the juvenile referee placed Z.M. with his natural mother, P.H. V.M. and L.M. were placed with their maternal aunt and uncle. The court ordered supervised visitation for each parent.

H.M. and R.M. appeal claiming the evidence presented at the adjudication hearing was insufficient to prove Z.M., V.M., and L.M. were in need of assistance. They also maintain the court lacked sufficient evidence to remove the children from the family home. Finally, H.M. and R.M. claim a proper foundation was not laid for admitting the expert testimony of Dr. Eva Christiansen.

Appellate review of a juvenile court's finding of a child in need of assistance is de novo. In the Interest of J.R.H., 358 N.W.2d 311, 317 (Iowa 1984). Of paramount concern is the welfare and best interest of the child. In the Interest of D.L., 401 N.W.2d 201, 202 (Iowa App. 1986). In determining what is in the best interest of the child, the court necessarily looks at the present conditions and past performance "for that performance may be indicative of the quality of the future care that parent is capable of providing." In the Interest of Dameron, 306

N.W.2d 743, 745 (Iowa 1981). See also, In re Loeffelholz, 162 N.W.2d 415, 419 (Iowa 1968).

The reviewing court must review the record to determine whether the finding of a child in need of assistance is supported by clear and convincing evidence. Iowa Code § 232.96(2) (1989). Although the appellate court is not bound by the findings of the juvenile court, "we give weight to the juvenile court's findings of fact because the juvenile court has had the unique opportunity to hear and observe the witnesses first hand" In the Interest of S.V., 395 N.W.2d 666, 668 (Iowa App. 1986).

The juvenile court adjudicated Z.M., V.M., and L.M. in need of assistance as defined in Iowa Code section 232.2(6)(c)(2) (1989) which provides: "The 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." The court relied on this section based on its finding A.B. was sexually and physically abused in the home; thus, Z.M., V.M., and L.M. were also at risk for sexual abuse by R.M. or physical abuse by H.M. resulting from improper parental supervision.

The record reveals clear and convincing evidence supporting the juvenile court's CINA adjudication. Both parents continued to deny the sexual abuse of A.B. occurred. In fact, H.M. attempted to influence A.B. to recant her allegations and maintained throughout the

proceedings A.B. was lying about the sexual abuse. As a result of the parents' denial, the children did not have an ally in the home. H.M. was incapable of protecting the children because she did not believe R.M. sexually abused A.B. In addition, she continued to allow R.M. unsupervised access to the children. Because R.M. did not admit the abuse, no therapeutic treatment was possible. The psychiatrist who evaluated R.M. described him as hostile. R.M. also reported past marijuana and alcohol abuse. Based on this evidence, we affirm the juvenile court's conclusion the children were in need of assistance.

R.M. and H.M. also argue there was insufficient evidence to remove the children from the family home. We disagree. The reasons previously discussed supporting the adjudication of these children in need of assistance also support their removal from the family home. Accordingly, we affirm the juvenile court on this issue.

Finally, R.M. and H.M. claim a proper foundation was not laid for admitting the expert testimony of Dr. Eva Christiansen. At the hearing Dr. Christiansen was asked to state her opinion on the risks to Z.M., V.M., and L.M. if the children remained in the home. R.M. and H.M. objected to Dr. Christiansen's testimony because she had no direct contact with the children.

In State ex rel. Leas, our supreme court set forth the following principles for admitting expert testimony:

This state adheres to a liberal policy concerning the admissibility of opinion testimony. Such evidence will be admitted if it is of a nature that will aid the jury and is based upon special training, experience, or knowledge with respect to an issue in controversy. The admissibility of opinion testimony . . . rests in the sound discretion of the trial court, and the trial court's determination will not be disturbed on appeal unless manifest abuse of that discretion causing prejudice to the complaining party is shown.

303 N.W.2d 414, 420 (Iowa 1981)(citations omitted).

The trial court's discretion is not unlimited, however. "Expert testimony is not admissible unless the witness is shown to be qualified and the facts upon which he bases his opinion are sufficient to enable a witness so qualified to express an opinion which is more than a mere conjecture." Ganrud v. Smith, 206 N.W.2d 311, 314 (Iowa 1973). "[S]ufficient data must appear upon which an expert judgment can be made, and if absent, the opinion is incompetent." Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516, 524 (Iowa App. 1977).

The record reveals Dr. Christiansen's opinion was based on the previous adjudication of sexual and physical abuse of A.B., the child abuse report filed on A.B., the psychological evaluations of R.M. and H.M., and Dr. Christiansen's experience with child sexual abuse victims and perpetrators. We find this to be an adequate foundation for the admission of Dr. Christiansen's testimony. Therefore, we affirm the juvenile court on this issue.

AFFIRMED.