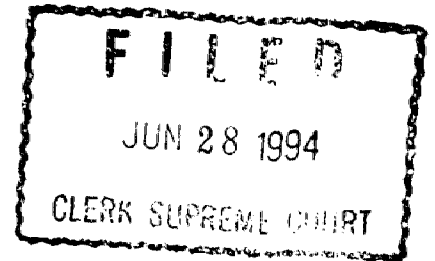


IN THE COURT OF APPEALS OF IOWA

No. 4-193 / 93-0808



IN THE INTEREST OF A.V.D., JR., Minor Child,
M.L.S. and A.V.D., Mother and Father,
Appellants.

Appeal from the Iowa District Court for Polk County,
Larry J. Eisenhower, Judge.

The natural parents appeal from a district court order adjudicating their minor child a child in need of assistance and placing the child in the custody of the Department of Human Services. **AFFIRMED.**

Michael D. Maxwell, Des Moines, for appellants.

Bonnie J. Campbell, Attorney General, John M. Parmeter, Special Assistant Attorney General, Judy Sheirbon, Assistant Attorney General, and Heather Dickinson, County Attorney, for appellee.

Michelle Chenoweth, Des Moines, guardian ad litem for minor child.

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

HABHAB, J.

The natural parents A.D. Sr. and M.L.S. appeal from a district court order adjudicating their minor child A.D. Jr. a child in need of assistance (CINA) and placing the child in the custody of the Department of Human Services. We affirm.

On November 11, 1992, the father, A.D., Sr., called an ambulance for his nineteen-month-old son, A.D., Jr., after he experienced respiratory distress and vomiting. M.L.S., the child's mother, was not home at the time. The child was admitted to the hospital and was diagnosed with pneumonia and an ear infection in both ears. The next day, hospital personnel noticed a six-inch red mark from the child's left clavicle to his right mandible. One of the attending physicians, Dr. Johnson, indicated this injury was not connected to the child's respiratory distress. However, it did appear to be intentionally inflicted so he notified child protective services.

Child protective investigator Steven Quick was assigned the case and spoke with Dr. Johnson and took pictures of the injury. Hospital personnel told Mr. Quick that neither the father or the mother had called the hospital to find out the child's condition. The father and mother were subsequently found at the county courthouse where they were appearing on a criminal matter. A policeman questioned them regarding the child's injury. The mother stated she was aware the child was in the hospital and that he had a

mark around his neck, but had not actually seen the mark. The mother said the father had informed her of the mark the day before. The father stated he thought the mark had been made from a tight shirt worn by the child or from the cord of a pull toy.

Mr. Quick measured the child's neck circumference at ten inches. The shirt worn by the child had a neck circumference of twelve inches. Mr. Quick obtained an opinion from a Dr. McAuliff, who stated the mark could not have been made from a shirt.

In an interview with Mr. Quick, the father stated the mother had left for work at 9:00 a.m. and the child slept in his playpen from noon until 4:00 p.m. The father noticed the child was wheezing and had rattly breathing when he went to feed the child supper. The father stated that after he fed the child some peaches, the child threw up and became violently red in the face. At this point, the father stated he placed the child face down and called the ambulance. When the father was told it was highly unlikely the shirt had caused the red mark, the father stated he believed the red mark might have been caused by the cord from a pull toy.

The mother stated she fed and diapered the child in the morning, left to run an errand, and left for work around 12:30 p.m. At this time, Mr. Quick recommended that they accept family preservation services or he would seek the child's placement in foster care.

On November 16, 1992, a CINA petition was filed. The father and the mother accepted family preservation services. The child abuse report filed by Mr. Quick stated that suspicions of abuse were founded but that the perpetrator was unknown since both parents denied any knowledge of the origins of the red mark.

A pediatric consultation team was later called upon to render an opinion regarding whether the child was in imminent danger by remaining in the family home. The team opined the child's injury was not an accident and could not have been caused by a tight shirt or a cord. Based on this opinion, the juvenile court officer, Rosa McRoy, obtained an ex parte order removing the child from the home.

At the temporary removal hearing, the father and mother both testified they still did not know how the child got the red mark on his neck. Although the family preservation services stated that they did not observe any behavior that would indicate the child would be in imminent danger, they were still concerned about the mark not being an accidental injury. On December 23, 1992, the juvenile court entered an order continuing the child's emergency removal from the home and foster care placement. On January 12, 1993, the juvenile court found the child to be a CINA pursuant to Iowa Code section 232.2(6)(b) and (c)(2) (1991). At the March 31, 1993, dispositional hearing, the father and mother stipulated to continued foster care and adopted a case permanency plan. The father and mother appeal.

In CINA proceedings, we review the evidence de novo. In re J.R.H., 358 N.W.2d 311, 317 (Iowa 1984). Of paramount concern is the welfare and best interests of the child. In re D.L., 401 N.W.2d 201, 202 (Iowa App. 1986). We 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) (1991). Although we are not bound by the findings of the juvenile court, we give weight to the juvenile court's findings of fact because that court has had the unique opportunity to hear and observe the witnesses first hand. In re S.V., 395 N.W.2d 666, 668 (Iowa App. 1986).

The father and mother contend the district court erred in allowing Mr. Quick to testify regarding statements Dr. McAuliff made to him when discussing the possible causes for the child's neck injury because such testimony is hearsay. We find Mr. Quick's testimony regarding his conversation with Dr. McAuliff is the same as that documented in the child abuse report that was admitted into evidence. Under Iowa Code section 232.96(6), the report 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 parents.

The parents also contend the testimony violated their constitutionally protected right to confrontation

guaranteed by the Sixth Amendment of the United States Constitution. In In re L.K.S., 451 N.W.2d 819, 822 (Iowa 1990), our supreme court held there is no Sixth Amendment right to confrontation in CINA proceedings.

The parents next assert they detrimentally relied on the State's assurance that Dr. McAuliff would testify. They claim they would have subpoenaed him if they had known the State did not intend to call him. However, the parents did not request a continuance nor did they make any effort to subpoena Dr. McAuliff on their own behalf for the second day of the hearing which was held eight days later. In addition, Dr. Johnson testified to the same findings Dr. McAuliff would have testified to had he been at the hearing. Dr. Johnson opined the injury was an inflicted, non-accidental, and possibly life-threatening injury which could not have been caused by the child's shirt collar or self-entanglement in a toy's cord.

The parents contend the child should not have been removed from the home. The parents argue there is no evidence in the record showing the child would be in imminent danger of further injury if he was to remain in their home. However, the parents stipulated to ongoing foster care for the child at the dispositional hearing.

The child has been diagnosed with a non-accidental injury which occurred while he was in his parents' custody. They do not have a tenable explanation for the injury. The family preservation workers indicated they had

not personally observed abusive actions by the father during their visits, but they were concerned about the unexplained injury.

We agree with the juvenile court that placement of the child outside the home is necessary because placement in the home at this time would be contrary to the child's best interests. We affirm the juvenile court's order continuing the placement of this child in foster care.

AFFIRMED.