IN THE COURT OF APPEALS OF IOWA

No. 6-275 / 95-1836

FILED
JUN 27 1996
CLERK SUPREME COURT

IN THE INTEREST OF B.K.K., A Minor Child,

M.K., Father,
Appellant.

Appeal from the Iowa District Court for Marion County, Pat Myers, Alternate District Associate Judge.

Father appeals an adjudication and dispositional order entered in a child in need of assistance proceeding. **AFFIRMED.**

Ronald F. Walker, Knoxville, for appellant.

Thomas J. Miller, Attorney General, Judy Sheirbon, Assistant Attorney General, and Philip Reser, Assistant County Attorney, for appellee State.

Gayle Nelson Vogel of Johnson, Lane & Vogel, Knoxville, guardian ad litem for minor child.

Heard by Habhab, P.J., and Cady and Huitink, JJ. Vogel, J., takes no part.

HUITINK, J.

M.K. appeals the juvenile court's order adjudicating his daughter, B.K.K., a child in need of assistance and the resulting dispositional order. We affirm.

M.K. and L.H. are B.K.K.'s parents. Although they are not married, they have lived together since B.K.K.'s birth on February 19, 1991, except for a brief separation when B.K.K. was an infant. These proceedings followed B.K.K.'s allegations of sexual abuse by her father. Her initial allegations were made while she was at the Department of Human Services (DHS) office with her father for other reasons. While there, B.K.K. told a social worker that her father "touched her." DHS dispatched an investigator to this family's home the same day accompanied by a police officer. B.K.K. repeated her allegations during her conversation with the police officer and investigator. B.K.K. pointed to her vagina when asked where her father touched her and she also told them M.K. had hit her with a belt. B.K.K. also told them she hated her dad and repeated her allegations when asked why. M.K. denied abusing his daughter but agreed to leave the home temporarily.

B.K.K. and her mother, L.H., were interviewed again on August 8, 1995. During this interview, B.K.K. stated, "My daddy didn't touch me and I want him home." The investigator summarily ended this interview because he felt B.K.K. had been coached by her parents. It was subsequently learned B.K.K.'s recantation followed a weekend visit with M.K. L.H. later acknowledged she had tried to persuade B.K.K. to tell the truth because she was hurting M.K. An evaluating

psychologist also noted B.K.K. was under pressure to recant so M.K. could return home.

B.K.K. repeated her earlier allegations during another conversation with a social worker on August 16, 1995. During this conversation, she stated M.K. touches her with a belt and again pointed to her vagina. She also provided a detailed account of her father entering her room at night and "putting his head down between her legs." B.K.K. told the worker she did not tell her mother about these occurrences because M.K. told her it was supposed to be a secret.

On August 18, 1995, the State filed a petition with the juvenile court alleging B.K.K. was a child in need of assistance because she had been or was imminently likely to be sexually abused by her father. An ex parte order was issued authorizing B.K.K.'s removal from her home and a no contact order prohibiting any contact between M.K. and his daughter was issued the same day.

On September 27, 1995, the juvenile court held a combined adjudicatory and dispositional hearing. The State's evidence supporting the allegations of sexual abuse included B.K.K.'s statements and the DHS's investigatory conclusions. M.K. testified he had never done anything of a sexual nature with B.K.K. He denied touching her genital area, hitting her with a belt, putting his head near B.K.K.'s vaginal area, or that he told B.K.K. to keep a secret. L.H. testified B.K.K. never indicated M.K. was hurting her or anything else suggesting M.K. was sexually abusing their child.

The trial record also includes a physician's report indicating no physical evidence of sexual abuse was found when B.K.K. was examined. Another expert testified B.K.K.'s testimony would be harmful to B.K.K. because of B.K.K.'s anxiety over these events and her desire to return home. B.K.K. did not testify.

Although the juvenile court declined to find B.K.K. was sexually abused by M.K., the court found she was imminently likely to be sexually abused by M.K. B.K.K. was accordingly adjudicated a child in need of assistance. The dispositional order entered the same day resulted in B.K.K.'s return to the custody of her mother. The no contact order was modified to permit family counseling and supervised visits.

M.K. appeals. He contends the juvenile court's findings are not supported by clear and convincing evidence. M.K. argues B.K.K.'s out-of-court statements are unreliable because of her ill feelings toward him. He also cites B.K.K.'s exposure to suggestive television programs, her August 8 recantation, and the absence of any physical evidence of abuse.

Appellate review of a juvenile court's finding of a child in need of assistance is de novo. *In re J.R.H.*, 358 N.W.2d 311, 317 (Iowa 1984). Our paramount concern is the welfare of the child. *In re D.L.*, 401 N.W.2d 201, 202 (Iowa App. 1986). The court must review the record to determine whether the juvenile court's findings are supported by clear and convincing evidence. Iowa Code § 232.96(2). Although we are not bound by the juvenile court's findings of fact, we give them weight because

of the juvenile court's proximity to the witnesses and its trial perspective. *In re S.V.*, 395 N.W.2d 666, 668 (Iowa App. 1986).

Iowa Code section 232.2(6)(d) defines a child in need of assistance as an unmarried child "who has been or is imminently likely to be sexually abused by . . . [a] member of the household in which the child resides."

Iowa Code § 709.1 provides:

> Any sex act between persons is sexual abuse by either of the participants when the act is performed with the other participant in any of the following circumstances:
>
> . . . .
>
> (3) Such other participant is a child.

A "sex act" means sexual contact and includes contact between the finger or hand of one person and the genitalia or anus of another. Iowa Code § 709.17. The sexual nature of the contact can be determined from the type of contact and the circumstances surrounding it. *State v. Pearson*, 514 N.W.2d 452, 455 (Iowa 1994).

Based on our de novo review of the record, we find clear and convincing evidence that B.K.K. has been sexually abused by her father, M.K. This child's initial allegations made to the police officer and child protective worker on August 3, 1995 were voluntary. In these statements, she clearly indicated M.K. touched her vagina and that it hurt her. Her only substantial deviation from this version of these events occurred following pressure from her parents to recant. Moreover, we are not inclined to discount the credibility of B.K.K.'s initial allegations simply because she was not required to testify at the adjudicatory hearing.

We acknowledge the juvenile court's findings were limited to the imminent prospect of sexual abuse and the court made no finding that B.K.K. was sexually abused. We, however, because of our de novo review, are not bound by this determination and are free to affirm the juvenile court on grounds on which it did not rely. Iowa Code § 232.133. (Our review of juvenile court proceedings is de novo.)

The juvenile court's adjudicatory and dispositional orders are accordingly affirmed.

AFFIRMED.