IN THE COURT OF APPEALS OF IOWA

No. 1-008 / 99-2013
Filed February 28, 2001

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CLERK SUPREME COURT

IN THE INTEREST OF A.L., A.L., J.L., and A.W., Minor Children,

T.P.L., Father,
Appellant.

Appeal from the Iowa District Court for Scott County, John G. Mullen, District Associate Judge.

T.P.L. appeals a juvenile court ruling finding the children A.L., A.L., J.L., and A.W. in need of assistance pursuant to Iowa Code sections 232.2(6)(b) and 232.2(6)(c)(2) (1997). **AFFIRMED.**

Thomas J. Pastrnak and Linda J. Messer of Pastrnak Law Firm, Davenport, for appellant.

Thomas J. Miller, Attorney General, Tabitha Gardner, Assistant Attorney General, and Murray Bell, Special Prosecutor, for appellee State.

Cheryl J. Newport of Newport & Newport, P.L.C., Davenport, guardian ad litem for minor children.

Ralph H. Heninger of Heninger & Heninger, P.C., Davenport, for C.L., mother of A.L. and J.L.

James D. Hoffman, Davenport, for G.W., mother of A.L. and A.W.

Maria K. Pauly of Wehr, Berger, Lane & Stevens, Davenport, for P.T., father of A.W.

Heard by Huitink, P.J., and Vogel and Mahan, JJ.

VOGEL, J.

Thomas L. appeals a juvenile court ruling finding the children Ashlyn, Alison, Jacob, and Abby to be in need of assistance pursuant to Iowa Code sections 232.2(6)(b) and 232.2(6)(c)(2) (1997). We find there was clear and convincing evidence supporting the adjudications and affirm.

Background facts. Thomas and Gina lived together beginning October 10, 1998. There were four children residing with Thomas and Gina, including Thomas' children, Alison and Jacob, ages six and three, Gina's daughter, Abby, age four, and Thomas and Gina's daughter, Ashlyn, born in August 1998. On the evening of November 23, 1998, while in the care of Thomas, Ashlyn stopped breathing and became unconscious. Thomas called 911 for emergency assistance and performed cardio-pulmonary resuscitation until the paramedics arrived. Ahslyn was then rushed to a local hospital where doctors determined she required the care of a pediatric neurologist, available at the University of Iowa Hospital. Ashlyn was flown to Iowa City and given emergency treatment. The injuries sustained by Ashlyn consisted of several subdural hematomas and retinal hemorrhaging. She remained hospitalized until December 18, 1998. Because these types of injuries are associated with "shaken baby syndrome," the Department of Human Services (DHS) was immediately contacted to assess the situation. On November 30, 1998, an order for temporary removal was entered as to Ashlyn. A December 1, 1998 shelter care hearing was held, placing Ashlyn with her maternal grandmother upon her release from the hospital. The children, Alison and Jacob were temporarily removed from the home and Thomas was

allowed only supervised visitation. Ashlyn, Alison and Jacob were all adjudicated to be children in need of assistance under Iowa Code sections 232.2(6)(b) and 232.2(6)(c)(2)[1] on June 11, 1999. On September 20, 1999, Abby's parents, Gina and Patrick, stipulated to the adjudication of Abby as a child in need of assistance under Iowa Code sections 232.2(6)(b) and 232.2(6)(c)(2). Thomas now appeals the adjudication of Ashlyn, Alison and Jacob and the denial of his motion to intervene in the adjudication of Abby.

Scope of review. Our review of child in need of assistance proceedings is de novo. *In re M.B.*, 553 N.W.2d 343, 344 (Iowa Ct. App. 1996). We review both the facts and the law, and adjudicate rights anew. *In re H.G.*, 601 N.W.2d 84, 85 (Iowa 1999). Our focus is on protecting the best interests of the child. *Id.* We are not bound by the findings of the trial court, but give them weight, especially as to the credibility of witnesses. Iowa R. App. P. 14(f)(7).

Ashlyn. Thomas asserts there was not clear and convincing evidence for the juvenile court to find he was Ashlyn's abuser and, therefore, she should not have been adjudicated in need of assistance. The record contains the

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[1] Iowa Code section 232.2(6) states:

> "Child in need of assistance" means an unmarried child:
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> b. Whose parent, guardian other custodian, or other member of the household in which the child resides has physically abused or neglected the child, or is imminently likely to abuse or neglect the child.
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> c. Who has suffered or is imminently likely to suffer harmful effects as a result of either of the following:
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> * * *
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> (2) 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.

depositions and testimony of many medical professionals who either provided care or reviewed Ashlyn's medical treatment, which we consider.

Thomas relies on *In re Driver,* 311 N.W.2d 87 (Iowa 1981), to support his position that the State has the burden of showing when the abuse occurred, whose custody the child was in at the time, or who the perpetrator was. There, the supreme court stated:

> [A] finding of child abuse may be supported by evidence of "(1) multiple injuries or other serious impairment of health that ordinarily would not occur in the absence of abuse or gross neglect, and (2) the parents' control over the child during the period when the abuse or neglect is alleged to have occurred."

Driver, 311 N.W.2d at 89 (quoting *Higgins v. Dallas County Child Welfare Unit,* 544 S.W.2d 745 (Tex. Civ. App. 1976)).

While the juvenile court found Ashlyn's injuries occurred on the evening of November 23, 1998 when she was in the sole care of Thomas, he asserts her collapse on that evening was caused by the gradual increase of pressure in her head from the bleeding of previously sustained injuries rather than a new injury inflicted that evening.

Thomas concedes the source of Ashlyn's injury was a non-accidental trauma. The treating doctors agreed Ashlyn has no diagnosed blood disorder that could have caused the intracranial bleeding. Dr. Kirschner, an expert on shaken baby syndrome, testified that subdural hemotomas are a classic symptom of this type of abuse and are caused by the tearing of small veins in the brain due to a violent shaking motion and the child's head whipping back and forth. Further, Dr. Kirschner testified as follows:

> Retinal hemorrhages are virtually in this circumstance - - in the absence again of bleeding disorders, leukemia, other diseases, are virtually diagnostic of shaken baby syndrome. They don't occur with head injuries related to falls, even from falls with height. They don't relate to increased intracranial pressure, and they are virtually diagnostic of shaken baby syndrome particularly, and they are found in association with subdurals.

Dr. Kirschner's testimony, along with a concession by Thomas that Ashlyn sustained injuries due to non-accidental trauma, provides clear and convincing evidence that Ashlyn was a victim of physical abuse.

We next consider whether Ashlyn was in the custody or control of Thomas when the abuse occurred. Thomas argues the State failed to adequately prove by clear and convincing evidence when the abuse occurred. The State contends the expert opinion of Dr. Kirschner clearly established that the trauma, which caused Ashlyn to lose consciousness and stop breathing, could only have occurred in a small window of time on the evening of November 23, 1998.

The CAT scan evidenced bilateral subdural hematomas. Thomas asserts these were two to seven weeks old and, therefore, it is unknown in whose care Ashlyn was when the abuse occurred. Thomas relies on the testimony of Dr. Hitchon, the neurosurgeon who treated Ashlyn on November 24, 1998, when he opined that she was suffering from increased intracranial pressure. Thomas further asserts the hematomas were a previous injury, which caused a gradually increasing amount of pressure on Ashlyn's brain until she lost consciousness on November 23, 1998.

Dr. Kirschner disagreed and testified the abuse that caused Ashlyn to stop breathing could only have occurred on the evening of November 23, 1998. He based this opinion on several factors including Ashlyn's recent history, as given by her parents. Gina testified she and her mother had taken Ashlyn shopping all day the day before the incident. They reported she had behaved normally and had been "happy as a lark." Further, Gina stated Ashlyn was fine the following day when she picked her up from daycare around 5:30 p.m. Thomas fed her a small bottle and she was put in her "bouncy seat" to watch television with the other children. The parents reported at that time that Ashlyn was tracking the figures on the screen with her eyes. Thomas testified she remained content in her seat until he put the older children to bed. Then he moved Ashlyn into her baby swing and went upstairs to shower. He stated she was happy and jabbering at that point. Immediately after his shower, he heard her fuss a little bit, went down to check on her and found her slumped over in her swing. He thought she was asleep and attempted to wake her for a feeding, after only two hours had elapsed since her last feeding. He then discovered she was not breathing. Dr. Kirschner testified it is impossible for the child to be exhibiting normal behavior in the previous days and throughout that evening and then to stop breathing with no intervening trauma to trigger the crisis. He supported this opinion with a medical analysis. Dr. Kirschner examined the MRI and CAT scans and found the brain did not reflect any midline shifting or swelling as would have been present if the pressure had been steadily increasing over an extended period of time, forcing the brain to shift or swell. On cross-examination, Thomas'

attorney asked Dr. Kirschner to review a radiology report by Dr. Berkow. The radiologist's analysis of the CAT scan also reported there was no mass effect observed. Dr. Kirschner explained the significance of this observation as follows:

> What is important is this first CAT scan that shows there is no mass effect, and in fact, in order to have progressive symptoms over two weeks from an expanding subdural, you have to have mass effect, and that's what I meant before when I talked about a shifting midline or some - - you know, marked brain swelling related to subdural.

The spinal tap taken when Ashlyn was initially treated produced clear fluid. If, in fact, the injury had been a previous injury, Dr. Kirschner stated this would have been reflected in the spinal tap by a showing of yellowed fluid, containing aged blood particles as they broke down. Subsequent taps did show the xanthochromic fluid or the yellowed staining.

Dr. Kirschner also testified the retinal hemorrhages were acute or recent. Although it is difficult to date a retinal hemorrhage, Dr. Kirschner determined they were recent and explained this determination as follows:

> [Y]ou can't age retinal hemorrhages. . . . But what you can do when you look at the eye is by the numbers that after a couple of weeks most retinal hemorrhages will have faded, so if you see, as here, very prominent retinal hemorrhages, this is much more consistent with an acute episode than with a previous episode, and it's the fact that they are very prominent here when she's admitted. That makes it much more likely that they are acute than two weeks old. If we only saw a few here and there, then I would say that's more consistent with being older, you know, from the previous episode.

Dr. Bonthius, a pediatric neurologist, treated Ashlyn the morning of November 24, 1998. During his deposition, Dr. Bonthius shared Dr. Kirschner's opinion that this was a recent trauma. On our review, we find the record contains substantial

evidence that Ashlyn received a non-accidental injury due to trauma while in the sole care of her father, Thomas. Accordingly, we find clear and convincing evidence that she is a child in need of assistance under Iowa Code sections 232.2(6)(b) and 232.2(6)(c)(2) (1997).

Alison and Jacob. Thomas next asserts the juvenile court lacked clear and convincing evidence to adjudicate Alison and Jacob to be children in need of assistance based on the injury to Ashlyn. He contends there has been no founded abuse of these two children and, therefore, they cannot be found to be children in need of assistance. Iowa case law supports removal of siblings when one child in the family has been abused. *In re C.W.*, 514 N.W.2d 754, 757 (Iowa Ct. App. 1994) (finding half-sibling should be removed and mother's parental rights to both children terminated where mother abused only one of the children). Iowa Code section 232.116(1)(c)(1) allows for a termination of parental rights where "[t]he court has previously adjudicated a child who is a member of the same family to be a child in need of assistance after such [an abuse] finding." Alison and Jacob have been adjudicated to be children in need of assistance under Iowa Code section 232.2(6)(b) due to an imminent danger of neglect or abuse. Although these children have no founded abuse reports as yet, clearly the intentionally inflicted, life-threatening injuries sustained by their baby sister indicate that they, as children residing in this household, are at risk of abuse as well. We find the record contains clear and convincing evidence that Alison and Jacob are children in need of assistance.

Abby. Finally, Thomas argues the juvenile court should not have denied his motion to intervene in the CINA proceeding regarding Gina's daughter, Abby. Gina and Patrick, Abby's biological father, stipulated that Abby is a child in need of assistance. The State claims Thomas is not Abby's biological father nor a guardian of the child and, as such, has no standing to intervene in Abby's adjudication. An interested party in an action is one who has a legal right or liability therein, which will be directly affected by the judgment or decree. *In re B.B.M.*, 514 N.W.2d 424, 427 (Iowa 1994). In addressing the role of a non-related adult, our supreme court has determined a non-biological parent figure was a legal stranger to the child, stating:

> He is an interested third party. He is not the child's biological father. He is not her adoptive father. He is not her stepfather. He is not her foster parent. He never married the child's mother. He is merely a man who lived with--and cared for--her mother, and who, understandably, became smitten with fatherhood after the child's birth.

Petition of Ash, 507 N.W.2d 400, 404 (Iowa 1993).

Here, Abby's parents have stipulated that she is a child in need of assistance. Thomas has no biological or legal bond to Abby and, therefore, has no standing to intervene in her CINA proceedings.

Having considered all arguments raised on appeal, we affirm[2].

AFFIRMED.

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[2] In our review of this case, we would prompt appellant to adhere to the strictures of Iowa Rule of Appellate Procedure 15, advising appellant to assemble an appendix containing only the relevant portions of the record. This courtesy will reduce both the printing expense and the reading burden on the members of the court. *See In re Marriage of Hunt*, 476 N.W.2d 99, 104 (Iowa Ct. App. 1991).