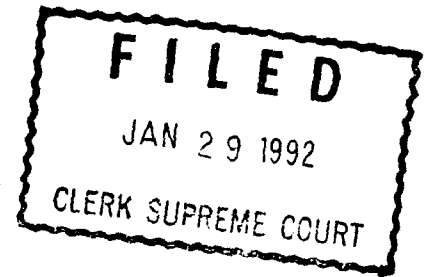


IN THE COURT OF APPEALS OF IOWA

No. 1-492 / 90-1814



663

IN THE INTEREST OF G.Y. and C.L., Children,
S.L., Mother,
Appellant.

Appeal from the Iowa District Court for Washington
County, Michael A. Stewart, Judge.

The mother has appealed from a CINA adjudication and subsequent dispositional order regarding her two children. She challenges the sufficiency of the evidence to prove that physical or sexual abuse occurred. She also contends the CINA adjudication should be set aside because the children were denied their right to counsel; she acknowledges that the children had the services of a guardian ad litem, but she argues that Iowa Code section 232.89(2) requires the appointment of an attorney as well as a guardian ad litem. **REVERSED AND REMANDED WITH INSTRUCTIONS.**

John E. Meyer, Independence, for appellant mother.

Bonnie J. Campbell, Attorney General; John M. Parmeter, Special Assistant Attorney General; and Kathrine S. Miller-Todd, Assistant Attorney General, for appellee State.

Leslie D. Lamping of Day & Meeker, Washington, guardian ad litem for the children (appellee).

D. Bradley Kieseey, Washington, for appellee natural father.

Considered by Donielson, P.J., and Hayden and Sackett, JJ.

DONIELSON, P.J.

This case involves two girls: G.Y., born in July 1977, and C.L., born in November 1984. The juvenile court found the girls had been sexually and physically abused by their mother and their mother's husband. Accordingly, the girls were adjudicated to be children in need of assistance and placed in foster care. The mother has appealed from the CINA adjudication and subsequent dispositional order. Her husband (C.L.'s father and G.Y.'s stepfather) has not appealed.

The mother challenges the sufficiency of the evidence to support the CINA adjudication. She contends the evidence failed to prove the girls were either physically or sexually abused. The mother also contends the CINA adjudication should be set aside because the court refused to appoint an attorney for the children. She acknowledges that the children had the services of an appointed guardian ad litem, but she argues that Iowa Code section 232.89(2) requires the appointment of both an attorney and a guardian ad litem. The mother argues that the failure to appoint a separate attorney for the children, in addition to the guardian ad litem, denied the children due process and also denied them their constitutional and statutory right to counsel. The State, the guardian ad litem, and G.Y.'s natural father have all filed appellee's briefs arguing that the CINA adjudication should be upheld.

Our review of CINA proceedings is de novo. In re J.R.H., 358 N.W.2d 311, 317 (Iowa 1984). We must review the record to determine whether the adjudication 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).

Of paramount concern is the welfare and best interest of the child. In re D.L., 401 N.W.2d 201, 202 (Iowa App. 1986). In determining what is in the best interest of the child, the court examines the parent's present and past performance "for that performance may be indicative of the quality of the future care that parent is capable of providing." In re Dameron, 306 N.W.2d 743, 745 (Iowa 1981).

From our review of the record, we find clear and convincing evidence to establish that both G.Y. and C.L. are children in need of assistance under Iowa Code sections 232.2(6)(b), (c)(2), and (d) (1991). However, we do believe the juvenile court erred in declining to appoint counsel for the children. We, therefore, reverse the juvenile court's adjudicatory and dispositional orders and remand the case for retrial.

We put aside the question as to the mother's standing to raise the issue concerning the juvenile court's refusal to appoint counsel for the children, and in the interest of justice, we examine the issue sua sponte. See In re J.V., 464 N.W.2d 887, 891-92 (Iowa App. 1990). Iowa Code section 232.89(2) (1991) provides, in relevant part: "Upon the filing of a petition, the court shall appoint counsel and a guardian ad litem for the child identified as a party to the proceeding." Subsection (4) provides:

The same person may serve both as the child's counsel and as guardian ad litem. However, the court may appoint a separate guardian ad litem, if the same person cannot properly represent the legal interests of the child as legal counsel and also represent the best interest of the child as guardian ad litem

Iowa Code § 232.89(4) (1991).

The mother requested the appointment of counsel for the children, but her motion was denied. Attorney Leslie D. Lamping was appointed by the court to serve as guardian ad litem to the children. Separate counsel was not appointed, and nothing in the record indicates that the juvenile court intended or instructed Attorney Lamping to serve in a dual capacity as both counsel and guardian ad litem.

We believe the juvenile court's refusal to appoint counsel for the children violated the children's statutory right to counsel codified at Iowa Code section 232.89(2) (1991). The children have been taken away from their parents and placed in foster care without the benefit of having their statutory rights satisfied. We reverse and

remand for retrial. We instruct the juvenile court to appoint counsel for the children. If the person appointed to advocate for the children's interests is to serve in a dual capacity as counsel and guardian ad litem, then the person should be appointed as such in order to clarify the advocate's duties.

The costs of this appeal are taxed to the State.

For all the reasons stated, the judgment of the juvenile court is reversed and remanded for a new trial with instructions.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Sackett, J., concurs; Hayden, J., concurs in part and dissents in part.

HAYDEN, J. (concurring in part and dissenting in part)

I concur with the majority in determining the record presents clear and convincing evidence to establish G.Y. and G.L. are children in need of assistance under Iowa Code sections 232.2(6)(b), (c)(2), and (d) (1991).

I disagree with the majority in holding the juvenile court erred in declining to appoint counsel for the children. I respectfully dissent on this issue.

The record in this case reveals Leslie D. Lamping not only represented these children's best interests as court appointed guardian ad litem, he also represented their legal interests as well.

Our supreme court has modified the traditional lawyer/client relationship in juvenile proceedings. This was determined in the case of In re J.P.B., 419 N.W.2d 387 (Iowa 1988). That case was a termination of parental rights. One of the issues involved the denial of the child's constitutional right to counsel. This claim on appeal arose from an allegation of conflict of interest by her court-appointed attorney. Id. at 388. The court acknowledged the duty of an ordinary lawyer/client relationship as follows:

We are mindful that in the ordinary lawyer-client relationship, the lawyer's role is not to determine the client's interest but to advocate the client's interest. See Iowa Code of Professional Responsibility for Lawyers DR7-101 (representing a client zealously requires that a lawyer shall not intentionally fail to seek the lawful objectives of a client). Such a duty may present an ethical dilemma in a juvenile proceeding where the objective is always the best

interest of the child, not the child's personal objective.

Id. at 391.

In deciding J.P.B. our supreme court relied upon a state of Montana child custody case, and cited the following:

"We recognize that . . . the attorney for the child is not a guardian ad litem. Nevertheless his role in a custody dispute is to advocate the child's best interest, not the child's wishes. This is a difficult role, particularly when the child's expressed wishes conflict with the attorney's determination of his best interest. But, given the immaturity of the client and the pressures that often exist in a divorce situation, it is this Court's opinion that the best interests of the child, the paramount concern in all custody disputes, is best served by modifying the traditional lawyer-client relationship.

* * *

This Court is aware that determining a child's best interests is difficult and is concerned about the child's right to an advocate. We reiterate our position that a child's wishes deserve serious consideration. If the court-appointed attorney concludes that the child's expressed wishes are not in his best interest the attorney must disclose this to the court. The district court must be clearly informed of the child's wishes and the basis for the attorney's determination that it is not in the child's best interest to live with the preferred parent."

Id. at 391, 392 (citing In re Marriage of Rolfe, 699 P.2d 79, 86-87 (Mont. 1985)).

The J.P.B. court adopted this concept and in doing so made the following observation:

We find such a pragmatic approach appealing. It gives priority to the paramount goal of discerning the child's best interest while enabling the lawyer to advocate an opposing viewpoint without fear of ethical violation. Moreover, such an

approach obviates the expensive and burdensome practice of appointing both a guardian ad litem and attorney for each child in a family to ensure that the child's expressed wishes as well as best interest are advocated.

Id. at 392.

In the proceedings before the juvenile court I observe in the instant case G.Y.'s desire to return home was presented to the court. Also, she wanted her parents to learn better parenting before she came home. In addition, G.Y.'s concern about G.L.'s temper and her belief her parents would not be truthful was shown to the court.

I view this record as clearly showing the court-designated guardian ad litem advocated the children's best interest. In addition, the desires and expressed objectives of the children were shown to the court. I determine, in reality, attorney Leslie D. Lamping additionally represented these children properly as their attorney in these proceedings. Iowa Code section 232.89(2)(4) (1991) provides the same individual may serve both as the child's counsel and guardian ad litem. There is no reason shown in this record the same person could not properly represent the children's legal interests as legal counsel and also represent their best interests as guardian ad litem. It is not necessary or required here to appoint a separate and distinct attorney for the children. The guardian ad litem has also represented them as their attorney, even though not formally appointed as such by the court.

I would affirm the juvenile court in all respects.