IN THE COURT OF APPEALS OF IOWA

No. 1-640 / 00-1638
Filed December 28, 2001

IN THE INTEREST OF V.V., Minor Child,

STATE OF IOWA,
Appellant,

CYNTHIA HUCKS, Guardian ad litem,
Appellant,

J.V., Father,
Appellant.

FILED
DEC 28 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Wapello County, William S. Owens, Associate Juvenile, Judge.

The State, father, and guardian ad litem appeal from the court's orders at both the adjudication hearing and the dispositional hearing allowing the child to remain in the mother's home pursuant to Iowa Code section 232.102(5)(a) and (b) (1999). **AFFIRMED.**

Victoria Siegel, County Attorney, for appellant-State.

Paul Zingg of Kiple, Kiple, Denefe, Beaver & Gardner, Ottumwa, for appellant-father.

Cynthia Hucks of Box & Box Attorneys, Ottumwa, for appellant-child.

Michael S. Fisher of Life Law Office, Oskaloosa, for appellee-mother.

Considered by Huitink, P.J., and Mahan and Vaitheswaran, JJ.

MAHAN, J.

The State, guardian ad litem, and father appeal a juvenile court order adjudicating Victor a child in need of assistance pursuant to Iowa Code sections 232.2(6)(c)(2) and (f) (1999). They claim the juvenile court erred in declining to additionally adjudicate the child in need of assistance pursuant to section 232.2(6)(b). They maintain the child should be removed from the mother's home because he had suffered or was imminently likely to suffer physical abuse if allowed to remain there. We affirm.

Background facts and proceedings. Amy is the mother of Victor, born November 7, 1991. In April of 2000 Victor's schoolteacher requested the children write about what they did on spring break. Victor entitled his one-page essay "My Spring Break" and drew a picture of he and his mother below the title. In essence, the essay stated, "[m]y terrible mom was hurting (or hitting) me. I don't like it! I wish I could hurt her! My spring break was bad. I wish she wasn't my mom! And this is about my bad mom! I am bad."

Victor's teacher, aware of Amy's five prior convictions for child abuse involving her stepson, became alarmed and notified the Iowa Department of Human Services (DHS). The next day Victor met with Jane Cardenzana, a DHS child abuse investigator. Upon investigation, Cardenzana gleaned from Victor's information that a tweezers and pin were used to remove a splinter from his finger. He denied any other type of physical abuse being inflicted. Amy corroborated Victor's statement that she had removed a splinter from his finger and denied any involvement in any abuse regarding Victor. Cardenzana

concluded that based on all the evidence, there was no evidence of physical abuse.

The State subsequently filed a child in need of assistance petition (CINA) on Victor's behalf based on three grounds: (1) that he was physically abused or was imminently likely to suffer physical abuse by his mother pursuant to section 232.2(6)(b); (2) that he would suffer or was imminently likely to suffer harmful effects as a result of his mother's failure to exercise a reasonable degree of care in supervising him pursuant to section 232.2(6)(c)(2); and (3) that he was in need of treatment to cure or alleviate serious mental illness or disorder, or emotional damage as evidenced by severe anxiety or depression, and Amy was unwilling or unable to provide such treatment, pursuant to section 232.2(6)(f).

At the adjudicatory hearing Sandra Van Weeldon and Joy Fullencamp, counselors who previously worked with Amy, testified that Amy failed to accept responsibility for abusing her stepson. They stated "there was very little Amy C. was not capable of doing to a child." Kathy Lowenburg testified that although she had no direct contact with Victor, based on his drawings and his mother's previous convictions, further assessment was necessary to determine whether he was the subject of ongoing physical abuse. Dr. Elizabeth Lonning, who conducted an assessment of Victor, expressed concerns about Victor's home environment and that possibly he was physical abused, despite the lack of physical evidence that any abuse occurred. She recommended services be continued to help Victor overcome his anxiety and depression. Dr. James Fleming testified Victor suffered from anxiety and depression, but did not give the

impression of being acutely traumatized. He stated "[i]t's possible that having a splinter removed from his hand could have been emotionally traumatic to him and triggered the alarming essay that he wrote in class."

The juvenile court concluded the State proved by clear and convincing evidence that Victor was in need of assistance pursuant to section 232.2(6)(c)(2) and (f). The court, however, ruled the State failed to prove by clear and convincing evidence that Victor had suffered or was imminently likely to suffer physical abuse from his mother under section 232.2(6)(b). The State, father, and guardian ad litem appealed the juvenile court's ruling. The juvenile court later confirmed the child's adjudication in a subsequent dispositional order, which the parties also appealed. The two cases were subsequently consolidated.

Scope of review. The court's 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). The court is not bound by the findings of the trial court, but gives them weight, especially as to the credibility of witnesses. Iowa R. App. P. 14(f)(7). The court's paramount concern is the child's best interests. *In re N.C.*, 551 N.W.2d 872, 872-73 (Iowa Ct. App. 1996). The State has the burden of proving the allegations of its CINA petition by clear and convincing evidence. *Id.*

Section 232.2(6)(b). The juvenile court found Victor to be a child in need of assistance pursuant to section 232.2(6)(c)(2) and (f), based on the court's conclusion that Victor had suffered or was imminently likely to suffer harmful effects from his parents' failure to properly supervise him, and that he was in need of treatment for mental illness or emotional damage and that his parents

were unable or unwilling to provide such treatment. However, the court failed to find clear and convincing evidence that Victor had suffered or was imminently likely to suffer physical abuse or neglect under section 232.2(6)(b).

Section 232.2(6)(b) provides that a child may be adjudicated in need of assistance where a "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." We conclude the State failed to prove by clear and convincing evidence that Victor likely suffered physical abuse or was imminently likely to suffer abuse while in his mother's care.

We find there is no evidence that Amy physically abused Victor. While Victor's essay and knowledge of Amy's violent past reasonably prompted alarm on the part of his schoolteacher, there is no further evidence that Victor suffered abuse. Cardenzana concluded that, based on her observations of the parties and the facts, no physical abuse had occurred. Victor ultimately explained that his mother removing a splinter from his finger caused his hurt. Amy corroborated this statement by indicating she removed a splinter from Victor's finger during spring break.

Victor's schoolteacher testified she was not aware of any signs of physical abuse against Victor prior to his essay, and that she was comfortable with Cardenzana's conclusion that no physical abuse had occurred. Although Van Weeldon and Fullencamp testified that Amy was not rehabilitated, they had no contact with Amy for at least a year prior to the alleged incident. Amanda

Johnson and Amy Salter both worked with Amy at the time of the adjudicatory proceedings, and both testified that Amy's actions with Victor were appropriate and expressed no concerns regarding his safety. While Lowenburg testified that based on the facts it was necessary to remove Victor from Amy's home, two other expert therapists stated there was insufficient information to make a conclusion from a drawing that physical abuse had occurred. While Dr. Lonning testified that Victor's prognosis for increased negative behavior was considerable if he remained in Amy's home, she did not conclude there was any evidence of physical abuse.

We believe the record is clear that Victor is a child in need of assistance due to his emotional needs and that Amy is either unwilling or unable to provide him with proper medical attention necessary to alleviate those symptoms. The juvenile court recognized this in finding him in need of assistance pursuant to section 232.2(6)(c)(2) and (f). As a result, he will obtain all necessary services under those sections. However the evidence is simply inconclusive whether he has suffered or was imminently likely to suffer physical abuse. The juvenile court was therefore correct in concluding the State failed to prove this particular element by clear and convincing evidence. We therefore affirm the juvenile court's adjudicatory and dispositional orders.

AFFIRMED.

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