IN THE COURT OF APPEALS OF IOWA

No. 1-363 / 00-1370
Filed August 29, 2001

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CLERK SUPREME COURT

IN THE INTEREST OF D.C.R., Jr. and D.R., Minor Children,

B.P.R., Mother,
Appellant,

D.C.R., Sr., Father,
Appellant.

Appeal from the Iowa District Court for Polk County, Karla J. Fultz, Associate Juvenile Judge.

The father and mother of two minor children appeal an interlocutory juvenile court order adjudicating their children to be in need of assistance. **AFFIRMED.**

Susan R. Stockdale of Roehrick, Hulting, Krull & Blumberg, P.C., Des Moines, for appellant mother.

David Pargulski of Carter, Pargulski, Kragnes & Koenig, Des Moines, for appellant father.

Thomas J. Miller, Attorney General, Tabitha Gardner, Assistant Attorney General, and Thomas DeSio, Assistant County Attorney, for appellee State.

Nicole Gargis Nolan of the Youth Law Center, Des Moines, guardian ad litem for minor children.

Considered by Vogel, P.J., and Zimmer and Hecht, JJ.

HECHT, J.

The father and mother of two minor children appeal an interlocutory juvenile court order adjudicating their children to be in need of assistance. The parents claim the juvenile court erred in concluding the State proved by clear and convincing evidence the children suffered physical abuse or neglect and they were imminently likely to suffer future harm if they remained in the parents' care. We affirm.

I. Factual Background and Proceedings. David, Sr. and Brandy are the parents of David, Jr., born June 23, 1999, and Dystyne, born June 15, 2000. The family's current involvement with child protective investigation began on May 17, 2000, after eleven-month-old David, Jr. received treatment for a skull fracture he sustained the night before in his parents' apartment. The parents reported David, Jr. had been sleeping in their bed when he fell into a narrow space between the bed and wall, struck his head on a beveled, freestanding headboard stored against the wall, and hit the floor. The bed was less than two feet in height. Brandy awoke to see David, Sr. picking up the child from the floor. She recalled checking the child for injuries and, finding none, comforting him back to sleep. The next morning she left for work and upon returning a few hours later, noticed David, Jr.'s head was swollen and contained a soft spot. He was not vomiting and exhibited no other symptoms.

David, Jr. was examined by the family's pediatrician, Dr. Debra Bixler, who suspected a skull fracture but regarded the mother's description of the fall as "not inconsistent" with such an injury. Brandy explained the scratches on her son's face had resulted from a fall on a relative's driveway. That afternoon an

anonymous caller informed Dr. Bixler Brandy frequently beat the child. Not suspecting abuse, Dr. Bixler did not report the injury to child protective services.

Dr. Michael Rubin, a pediatric radiologist, reviewed David, Jr.'s x-rays and confirmed the skull fracture. According to research he cited, ninety-five percent of falls from three feet or less resulting in skull fractures are nonaccidental. The skeletal survey also revealed a healed, two to three month old bone fracture in the child's left arm. Medical records indicated David, Jr. had suffered a burn on his back while in the custody of his father in January of 2000. The scar left by that burn was still visible four months later when David, Jr. was removed from the home. The CINA petition for David, Jr. stated a daughter, Tiffany, was removed from Brandy's care in 1996, following disclosure that the child was the product of an incestuous relationship between Brandy and her brother. Brandy's parental rights to that child were terminated following CINA allegations of sexual abuse, incest, and denial of critical care.

Child protective services filed a founded case of child abuse and David, Jr. was removed on May 18, 2000. The State filed a child in need of assistance (CINA) petition the next day. A second child, Dystyne, born to the couple on June 15, 2000, was removed from the home with the parents' consent. After proceedings focusing on the origin of the child's head injury, the court adjudicated David, Jr. and Dystyne CINA on August 4, 2000. The parents appeal.

II. Standard of Review. We review child in need of assistance cases de novo. Iowa R. App. P. 4; *In re E.H.*, 578 N.W.2d 243, 248 (Iowa 1998). The reviewing court must determine whether the CINA finding is supported by clear

and convincing evidence from the record. Iowa Code § 232.96(2) (1999). While the court is not bound by the findings of the juvenile court, "we give weight to [its] findings of fact because the juvenile court has had the unique opportunity to hear and observe the witnesses firsthand." *In re C.M.*, 526 N.W.2d 564, 565 (Iowa Ct. App. 1994). Our paramount concern is the best interest of the children. *In re N.C.*, 551 N.W.2d 872, 872 (Iowa 1996).

III. Adjudication as Children in Need of Assistance. The parents argue there was insufficient evidence to adjudicate their children in need of assistance under Iowa Code sections 232.2(6)(b) and (c)(2)[1]. At the children's CINA hearing, the juvenile court heard conflicting testimony regarding the source of David, Jr.'s skull fracture. Dr. Bixler, the family's pediatrician, did not attribute the injury to abuse. She deemed it an accident due to the child's lack of brain damage and bruising, the absence of correlative symptoms, her familiarity with the mother's parental abilities, and the consistency between the injury and the parent's story.

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[1] Iowa Code section 232.2(6) defines a "Child in need of assistance" as an unmarried child:

> 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.
>
> c. Who has suffered or is imminently likely to suffer harmful effects as a result of either of the following:
>
> (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.

Iowa Code § 232.2(6)(b) and (c)(2).

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Dr. Rubin, by contrast, found little consistency between David, Jr.'s injury and the parent's explanation of it. The pediatric radiologist emphasized only five percent of falls from a height of three feet or less resulting in a skull fracture are nonaccidental. His suspicions were heightened by the discovery of the child's healed forearm fracture and the burn on his back. Given this history and the unwitnessed circumstances of the fall, Rubin concluded the skull fracture was not likely an accident.

The trial court found Dr. Bixler less credible than Dr. Rubin, and we find ample reason to support this conclusion. Dr. Bixler has known Brandy for eleven years, from her childhood vaccinations through the birth of her children. The doctor espoused great trust in Brandy's abilities, candidly questioning the court's termination of her parental rights to her first daughter, Tiffany. While we hesitate to doubt her judgment and objectivity, Dr. Bixler discounted substantial evidence suggesting cause for concern. Though not yet a year old, David, Jr. sustained a scarring burn, a forearm fracture, and an eight centimeter skull fracture under circumstances raising suspicion at best and implying abuse at worst. In her eleven years as a licensed pediatrician, Dr. Bixler had never seen another child receive a skull fracture from falling out of bed.

Assuming Dr. Bixler's high regard for Brandy was justified, it would not apply equally to the children's father and primary caretaker. David, Sr.'s psychological testing suggested aggressive traits, a lack of conformity, and low impulse control. He testified to heavy and regular use of marijuana, and tested positive for drug use after David, Jr.'s removal from the home. Inconsistencies in the father's testimony on the day after his son's injury also undermined his

credibility. While David, Sr. claimed he was unaware of the injury until he awoke at 10:30 a.m., his stepsister stated her children were in his care three hours earlier. Lastly, there is the testimony of Debra, the family acquaintance who testified to David, Sr.'s temper, and rough handling and neglect of the child. She reported to child protective services officials David, Sr. had kicked the child in the arm as he sat in his carrier.

On this record, we find clear and convincing evidence to support David, Jr. and Dystyne were children in need of assistance under Iowa Code sections 232.2(6)(b) and (c)(2). We therefore affirm the juvenile court's ruling.

III. Imminent Likelihood to Suffer Injury. The parents claim there was insufficient evidence to support the juvenile court's finding the children faced imminent danger if allowed to remain in their custody.[2] As established by the juvenile court's CINA adjudication findings, clear and convincing evidence existed to justify the removal of David, Jr. and Dystyne. The parents'

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[2] Section 232.78 ("Temporary custody of a child pursuant to ex parte court order") provides in relevant part:

> 1. The juvenile court may enter an ex parte order directing a peace officer or a juvenile court officer to take custody of a child before or after the filing of a petition under this chapter provided all of the following apply:
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> a. The person responsible for the care of the child is absent, or though present, was asked and refused to consent to the removal of the child and was informed of an intent to apply for an order under this section, or there is reasonable cause to believe that a request for consent would further endanger the child, or there is reasonable cause to believe that a request for consent will cause the parent, guardian, or legal custodian to take flight with the child.
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> b. It appears that the child's immediate removal is necessary to avoid imminent danger to the child's life or health.
>
> c. There is not enough time to file a petition and hold a hearing under section 232.95.

Iowa Code § 232.78(1)(a),(b),(c).

performance in the five months immediately preceding David, Jr.'s removal was sufficient to trigger the imminent danger standard. In this brief time, David, Jr. was subjected to three discrete physical injuries. First, in January 2001, the six-month-old infant was treated for a burn on his back allegedly incurred after he fell off a couch and onto a radiator steam boiler. Two months later he received a forearm fracture that, in the opinion of the expert pediatric radiologist, should have been obvious to his caretaker. It remained untreated. Finally, in mid-May, he suffered the skull fracture that was ninety-five percent likely to have been received by nonaccidental means.

The family's pediatrician, Dr. Bixler, believed neither child would be at risk for physical abuse in their parents' home. While normally her assessment would be afforded deference, Dr. Bixler made little effort to disguise her bias for Brandy. At the CINA hearing, she voiced disapproval of the termination of Brandy's first child despite her limited knowledge of the situation. Her opinion does not alter the clear and convincing pattern of physical danger apparent in this household. In addition, David, Sr.'s drug use poses a substantial risk to both children's well-being, particularly given his role as their primary caregiver. The injuries to David, Jr. occurred on his father's watch, and David, Sr.'s positive drug test results belie his assurances of cessation of drug use.

Given the severity and frequency of David, Jr.'s injuries, in addition to the factual circumstances and background of the two parents, we find clear and convincing evidence the children are imminently likely to suffer injury if returned to the custody of David, Sr. and Brandy.

AFFIRMED.