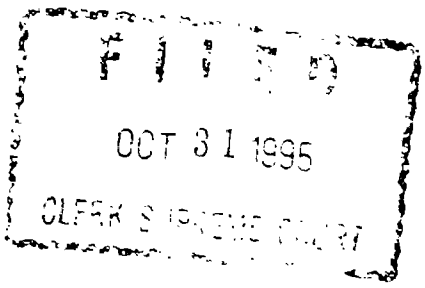
IN THE COURT OF APPEALS OF IOWA

No 5-502 / 95-0189



IN THE INTEREST OF S.A., A Minor Child,

K.A., Mother,

Appellant.

Appeal from the Iowa District Court for Polk County, Constance C Welu, Associate Juvenile Court Judge.

K.A appeals the order adjudicating her daughter in need of assistance **AFFIRMED.**

Michael J Burdette of Cook, Gotsdiner, McEnroe & McCarthy, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Diane Stahle, Special Assistant Attorney General, Judy Sheirbon, Assistant Attorney General, John Sarcone, County Attorney, and Heather Dickinson, Assistant County Attorney, for appellee State.

Martha L. Johnson, Des Moines, for appellee minor child.

J. Michael Mayer, Des Moines, for appellee custodian/maternal grandmother.

B.M., Des Moines, pro se, father.

Heard by Hayden, P.J., and Habhab and Huitink, JJ.

HAYDEN, P.J.

S A. was born on July 29, 1984, to K.A and B.M. who have never been married S A was removed from K.A.'s care in July 1986 because she had been sexually abused by K.A 's boyfriend. K.A. underwent substance abuse treatment and parenting education. S.A. was returned to K.A.'s care in 1988. During the same year, K.A. began living with S.B. S.A. lived with K.A. and S.B. until 1992. She then moved in with her natural father, B.M., for five to six months. S.A. returned to K A.'s home for a while, but again went to live with B.M at her request in June 1993.

In March 1994 S.A. began living with her maternal grandmother. In May 1994 S.A. reported to her grandmother S B had sexually abused her twice the previous year. She related on one occasion S.B. told her to place her finger in her vagina and then he placed his finger in her vagina. S A stated on another occasion S.B. ordered her to touch his penis. She did so because she was afraid of S.B. She refused, however, to put her mouth on his penis. S.A. also related an instance where S.B. made her watch movies with naked women in it and made her look at pornographic magazines.

A child abuse investigation resulted in a founded report of sexual abuse. A petition to find S.A. a child in need of assistance (CINA) was filed. At the hearing, K.A. testified S.A. was lying. K.A. stated she would never believe S.B. sexually abused S A because S.A. had a history of lying. At the hearing, S.A admitted she had previously lied about certain events to avoid getting into trouble, but she maintained S B had abused her.

Despite K.A.'s claims S.B would never sexually abuse S.A., she admitted S.B physically abused her several times during their relationship. Although S.B admitted to striking K.A. on occasion, he claimed their relationship was not abusive. K.A. also testified, while S.A. lived in their home, she abused crank and S.B used alcohol and marijuana.

The juvenile court adjudicated S.A. CINA pursuant to Iowa Code section 232.2(6)(c)(2) (failure of parent to adequately supervise) and 232.2(6)(d) (child likely to be sexually abused by member of household). The court based its decision in part on: (1) the credibility and motives of the witnesses, including the use of crank by the mother and marijuana by S.B. during the time at issue; (2) the affect and demeanor of the witnesses; and, (3) the consistency of the child's report of sexual abuse under vigorous cross-examination. A dispositional order was filed on January 6, 1995, placing S.A. in the care of her grandmother under the supervision of the Iowa Department of Human Services.

K.A. appeals. She alleges the juvenile court erred in adjudicating S.A. to be CINA because there was not clear and convincing evidence S.B. had sexually abused S.A. In particular, K.A. states the court erred in finding S.A. was a credible witness. In support of this contention, K.A. refers to the testimony of several witnesses who indicated S.A. lied in the past about many events. Among these lies included instances where S.A. falsely accused both her grandfather and a babysitter of sexually abusing her. K.A. also refers to testimony from several people who indicated S.B. had never

acted inappropriately in caring for children. K.A also emphasizes S B did not have access to S.A. in order to perpetrate the sexual abuse.

I. Standard of Review.

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). 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 necessarily looks at the present conditions 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); *see also In re Loeffelholz*, 162 N.W.2d 415, 419 (Iowa 1968).

The reviewing court must review the record to determine whether the finding of a child in need of assistance is supported by clear and convincing evidence Iowa Code § 232.96(2) (1991). Although, on review, the court is not bound by the findings of the juvenile court, "we give weight to the juvenile court's findings of fact because the juvenile court has had the unique opportunity to hear and observe the witnesses firsthand." *In re S.V.*, 395 N.W.2d 666, 668 (Iowa App. 1986).

II. CINA Petition.

The issue in this case turns primarily on the credibility of the witnesses. As stated above, we give weight to the juvenile court's findings with regards to credibility because it had the opportunity to hear and observe the witnesses firsthand. Given the

testimony as presented, there is clear and convincing evidence S.A. was sexually abused by S.B. As such, the juvenile court properly adjudicated S.A. to be CINA pursuant to Iowa Code section 232.3(6)(C)(2) and (6)(D). We affirm.

With regard to S.A.'s credibility, she has been consistent in describing the incidents of abuse perpetrated by S.B. Furthermore, S.A. admitted she had a problem with lying about certain things in the past. However, after each prior instance in which she lied, she immediately recanted. Once assured she would not get "in trouble," S.A. would admit she lied and would then tell the truth. There was no such recantation with regards to the allegations in this case. From the beginning, S.A. has continually and consistently stood by her story even in the face of rigorous cross-examination. Although appellant claims S.A. gave conflicting statements with regards to the abuse and her reason for not speaking out earlier, we do not agree. A child protective investigator testified S.A. was consistent in her reports throughout the investigation.

We also do not believe the previous allegations of sexual abuse have any bearing on this case. The accusation of sexual abuse against S.A.'s grandfather resulted from S.A., at age four, poking her babysitter on the buttocks and saying her grandfather does it to her. S.A. said this because her grandfather would give her boosts on her bottom with his hand or knee. Evidence indicates S.A. herself may not have initiated the allegation, but someone else may have because of S.A.'s inappropriate actions. Nonetheless, when confronted by her mother about the allegations against the grandfather, S.A. immediately recanted. We also know S.A. did not lie about having

sexual contact with an older male cousin because the contact was observed by another cousin. With regards to the allegation made against the babysitter, again the evidence indicates S.A. recanted almost immediately.

We do not find K.A.'s testimony credible. Although she testified S.B. assaulted her on at least five occasions, she stated she would never believe he had sexually abused S.A. Additionally, during the time in which the abuse allegedly took place, K.A. was abusing crank. K.A. contends S.A. made up these allegations in order to get S.B. and her half-siblings out of the home so S.A. could live alone with her mother. This motive to lie, however, is unbelievable because S.A. has requested to live with her father from approximately June 1993 until March 1994 when she reported the abuse. Furthermore, even though S.A. has not been allowed to live with her mother, she still has not recanted.

S.B.'s testimony is also unconvincing. He admitted to physically assaulting K.A. on several occasions. Nonetheless, he claims their relationship is not abusive. S.B. also admits he used alcohol and marijuana during the time the abuse allegedly took place. The evidence also indicates S.B. has a tendency to be abusive toward children. While babysitting, S.B. struck a child and left a welt. Additionally, one of S.A.'s cousins testified S.B. made S.A. run laps and would tell S.A.'s half-sister to bite and kick S.A. and pull her hair.

Several persons testified S.B. had a history of being a good caretaker of young children. We determine, however, these witness are not credible. There was substantial

evidence concerning S.B.'s inappropriate behavior including, S.A.'s cousin's testimony about how S.B. treated S.A., S.B.'s and K.A.'s testimony about S.B.'s violence towards K.A.; S.B.'s testimony admitting he hit a child; and testimony about S.B.'s drug and alcohol use. Given this evidence, it is apparent these witnesses were not aware of S.B.'s history of violence and drug usage. Interestingly, all of the witnesses who testified to S.B.'s care for their children admitted the care had occurred at least five years prior to the time of the hearing. K.A., however, testified S.B. had not done any child care and had not been alone with other people's children during the eight years she had known him.

We determine there is clear and convincing evidence S.A. was sexually abused by S.B. Additionally, because the mother does not believe the child was abused, and testified nothing would convince her of the fact, there is clear and convincing evidence the child would not be properly supervised or protected by the mother. As such, the juvenile court properly adjudicated S.A. to be CINA pursuant to Iowa Code section 232.3(6)(C)(2) and (6)(D). We affirm.

AFFIRMED.