IN THE COURT OF APPEALS OF IOWA

No. 0-596 / 90-552

FILED
DEC 27 1990
CLERK SUPREME COURT

IN THE INTEREST OF S.S. and M.M., Children.

K.M., Mother,
Appellant.

Appeal from the Iowa District Court for Johnson County, Sylvia A. Lewis, District Associate Judge.

The mother of two girls appeals from juvenile court orders adjudicating the girls to be children in need of assistance and placing one of them in foster care. **AFFIRMED.**

Constance Peschang-Stannard, Iowa City, for appellant mother.

Thomas J. Miller, Attorney General, Gordon E. Allen, Deputy Attorney General, and Judy Sheirbon, Assistant Attorney General, for appellee State.

Stephen N. Greenleaf of Lynch & Greenleaf, Iowa City, guardian ad litem for appellee children.

Heard by Oxberger, C.J., and Donielson and Habhab, JJ.

OXBERGER, C.J.

This case involves two children, half-sisters, S.S., born in October 1972 and M.M., born in September 1978. The two girls have the same mother, K.M., whom they lived with until the events described below. Neither child's father played an active role in the children's lives in recent years.

The older girl, S.S., has displayed numerous behavioral problems. M.M. suffers from tuberous sclerosis, a rare genetic neurological disorder. The complications of this disorder include seizures, ocular abnormalities, behavioral problems, and learning difficulties. Testimony showed that K.M. has coped well with M.M.'s special needs.

In May 1989, S.S. told a friend she had been sexually fondled by M.L., her mother's live-in boyfriend. Mother disputes the validity of this report claiming S.S. fabricated the story to retaliate for discipline imposed by herself and M.L. S.S.'s report was conveyed to officials, who then interviewed M.M. M.M. also reported sexual fondling by M.L., in an interview her mother characterizes as improperly suggestive. A physical examination of M.M. revealed a vaginal scar consistent with sexual abuse, but the exam did not conclusively establish sexual abuse.

Mother has refused to believe M.L. engaged in inappropriate sexual contact with either girl. M.L. was convicted of two counts of lascivious acts with a child.

M.M. was the victim of the offenses and she testified in open court at the criminal trial. Mother testified as a witness for the defense in M.L.'s trial. Following M.L.'s conviction, Mother asked him to move out of her home, however, it is not clear if Mother plans to continue her relationship with M.L. Mother and M.L. did apply for a marriage license during the first day of M.L.'s criminal trial.

Both girls were adjudicated children in need of assistance due to sexual abuse by M.L. M.M. was initially placed in foster care due to Mother's refusal to believe the sexual abuse allegations or to remove M.L. from her home. After a dispositional hearing, M.M. was placed in the home of her maternal aunt and uncle. S.S. was placed in rapid succession with her father, other relatives, and in shelter care; she refused to stay any place for an extended period of time. On limited remand from the supreme court, S.S.'s CINA case was dismissed on July 5, 1990. The court found S.S. no longer required the protection of the juvenile system because of her age and ability to voluntarily request State assistance.

Mother appealed the CINA adjudications and the subsequent dispositional orders. She challenges the sufficiency of the evidence to support the CINA adjudications contending the evidence failed to prove sexual misconduct by M.L.

Mother also challenges M.M.'s placement outside her home. She asserts that because of the close bond between herself and M.M. she is the best person to deal with M.M.'s problems arising from her tuberous sclerosis.

Mother contends the juvenile court erred by overruling her request for independent mental and physical examinations of the children, by failing to order M.L. out of her home as permitted by Iowa Code section 232.82, and by not allowing her children to remain in her home.

Mother also claims denial of due process in several respects by the initial removal of the children from her home, prior to the CINA adjudications. She complains about the removal procedure itself, the interviews with the children which led to the removal, the written reports based on those interviews, and the failure to return the children to the home promptly after the removal.

Finally, Mother contends the children's guardian ad litem rendered ineffective assistance of counsel by "aligning himself completely with the State" and failing to present any independent evidence.

We review child in need of assistance proceedings de novo. In re Blackledge, 304 N.W.2d 209, 210 (Iowa 1981). We give weight to the juvenile court's fact findings, especially when considering the credibility of witnesses but are not bound by them. Iowa R. App. P. 14(f)(7). In child custody cases the welfare and best interests of the children

involved are paramount. Iowa R. App. P. 14(f)(15). A rebuttable presumption exists that the best interests of a child are served by parental custody. In re B.B., 440 N.W.2d 594, 596 (Iowa 1989). We construe the provisions of Iowa Code chapter 232 liberally to protect the welfare of children. Id. While parents possess an interest in the integrity of the family unit, the interest may be forfeited by certain parental conduct. In re Dameron, 306 N.W.2d 743, 745 (Iowa 1981). Further, we look to the child's long-range as well as immediate best interests. Id.

Before delving into Mother's argument we agree with the State this appeal is moot with respect to S.S. because of the dismissal of her CINA case on limited remand. A case is moot if it no longer presents a justiciable controversy because the issues become academic or nonexistent. In re E.C.G., 345 N.W.2d 138, 141 (Iowa 1981).

After thoroughly reading the briefs and record in this case, we find the main issue to be if the State acted properly in protecting M.M. from inappropriate sexual behavior toward her by an adult male living in her family home. We are concerned that Mother has characterized this case as a fight between herself and the State. We feel in situations of this sort the parent of sexually abused children should be united with the State in the goal of protecting and supporting the children. Mother's adversarial stance seems to be at the core of this appeal.

Mother consistently claims an inability to understand how it can be in her children's best interests to be removed from her home while also consistently disclaiming any belief in her daughter's descriptions of M.L.'s sexual abuse towards them. We are especially concerned that this disbelief is in the face of M.L.'s criminal convictions for just such behavior. Additionally, the record is replete with the testimony of experts finding it not in M.M.'s best interests to be returned to a home where her mother does not believe her. The experts also state M.M. could be revictimized by her return to a mother unable to assist her in coping with the abuse by providing a loving supportive atmosphere. We find ample support for the decision that a return to Mother's home would not be in M.M.'s best interest at this time.

The State contends, and we are inclined to agree, Mother failed to preserve many of the procedural errors she now complains of. Even so, we find any procedural errors were cured when the juvenile court set aside the order adjudicating M.M. a child in need of assistance, allowed Mother to withdraw any stipulations, and ordered a new trial to adjudicate the matter in an order filed November 15, 1989. Again we are concerned that Mother has attempted to create the atmosphere of a criminal trial in proceedings designed to protect her children.

GUARDIAN AD LITEM. A juvenile claiming ineffective assistance of counsel in a civil proceeding must prove both that the counsel's performance was deficient, and actual prejudice resulted. In re J.P.B., 419 N.W.2d 387, 392 (Iowa 1988). After evaluating the record, we do not find the guardian ad litem's performance resulted in actual prejudice to M.M. We are concerned that the guardian ad litem appeared to align himself with the State after deciding the State's position was in the girl's best interests. We feel a guardian ad litem is an important cog in the legal machinery protecting juveniles. A guardian ad litem's role should include active and independent participation in all proceedings to insure the court is fully apprised of all circumstances affecting and dependent upon its decision. The role should also include more than simply deciding which ultimate outcome will be in the child's best interest. The guardian ad litem should investigate all facts relevant to the case, ensure the court is aware of all dispositional options, ensure that the child's interests and rights are fully protected in all proceedings, and allow the child's express wishes be placed before the court. See Anderson, "The Guardian Ad Litem and Child Custody Proceedings--Avoiding Solomon's Solution." The Guardian Ad Litem: Role and Function, Final Report to the Iowa Lawyers Trust Account Commission, P. 95 (July 1988). See also In re J.V., No. 0-532/90-547, slip op. (Oct. 23, 1990).

We do not imply that a guardian ad litem must advocate only a child's express interests but rather, after evaluating all relevant facts, what is in the child's best interests. Additionally, the guardian ad litem should function as a check upon the system to ensure the child's rights are protected and the State follows the appropriate procedural mandates when invading the juvenile's life as well as his or her body. We are concerned that in this case the State and many of those responsible for protecting M.M. were more concerned with reaching the ultimate goals rather than making sure that each step taken in reaching those goals were in her best interest and served to protect the integrity of the system.

AFFIRMED.