IN THE COURT OF APPEALS OF IOWA

No. 3-205 / 92-1602

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FILED
JUN 29 1993
CLERK SUPREME COURT

IN THE INTEREST OF C.A.E. a/k/a C.A.C. and J.J.E. a/k/a J.J.C., Minor Children.

**N.E., Mother,
Appellant,**

**J.C., Natural Father,
Appellant.**

Appeal from the Iowa District Court for Jasper County, Scott Rosenberg, Judge.

The mother and adjudicated father appeal from an order providing for the continued foster placement of their two common children. **AFFIRMED.**

Terry Rickers of Matthias, Tyler, Nuzum & Greta, Newton, for appellant father.

Steven J. Holwerda of Selby, Updegraff, Smith & Holwerda, Newton, for appellant mother.

David A. Adams, Des Moines Juvenile Defender's Office, Des Moines, guardian ad litem for the children.

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

Heard by Oxberger, C.J., and Donielson, J., and Keefe, S.J.*

*Senior Judge from the 1st Judicial District serving on this court by order of the Iowa Supreme Court.

OXBERGER, C.J. 000067

On October 29, 1991, N.E. gave birth to twins, C.A.E. and J.J.E. On October 30, 1991, N.E. and J.C. signed a consent to temporary removal. A CINA petition was filed the following day based on Iowa Code sections 232.2(6)(c)(2) and (6)(n) (1991). The paternity of the twins was in question. At the time of their conception N.E. was married to B.C. At the time of their birth she was living with J.C. N.E. claimed J.C. was the father.

At a December 1991 adjudicatory hearing the court received evidence of N.E.'s inability to raise her previous three children. Her parental rights were terminated on her first child after N.E. voluntarily placed the child in foster care. N.E. had a second child who died of SIDS before he was two months old. It was not proven N.E. was directly responsible for the death, but it was shown she did not care for any of his vital needs. The court noted N.E.'s third child had been found CINA and N.E.'s parental rights terminated "after extensive efforts" from many service providers. The court concluded N.E. "was unwilling and, perhaps, unable to learn to properly care for an infant."

The court would not find contrary to the presumption of paternity in favor of N.E.'s husband, B.C., and assumed paternity would be established by DNA testing within a few weeks. B.C. acknowledged he would not be able to care for

the children. An order was entered finding the twins in need of assistance.

A dispositional hearing was held in August 1992. DNA testing had not been done, but J.C. claimed to be the father and B.C. had informed the court he had abandoned any claim to paternity. J.C. and N.E. continued to live together and had three children from a prior marriage of J.C. in their home. N.E. and J.C. were granted visitation once a week.

A clinical psychologist evaluated N.E.'s and J.C.'s ability to parent. She testified N.E. was IQ deficient, did not understand people well, and overreacted in stressful situations. She felt N.E. had limited capacity to gain anything by services provided by DHS. The psychologist said J.C. did desire to be close and caring and had a positive approach to improving his parenting skills. She also noted J.C. had problems dealing with stress and cited a founded physical abuse report in 1991. She expressed strong concern about J.C.'s ability to cope with two more children in the home. She felt J.C. and N.E. were not able to act as adequate parents at that time.

A family therapist had been involved with the parents in an eight-week course to improve their parenting skills and had observed them in their home. He noted improvement but was not sure of their ability to handle five children outside the structured setting of an educational course.

A social worker testified as to the twelve years of in-home counseling N.E. received and stated her belief N.E. had reached maximum benefits. She believed that the level of stress in the home would go up if the twins, who had recently gone off apnea monitors but were still especially susceptible to bronchial infections, were placed in the home. N.E. and J.C. testified they thought they were able to care for the twins. The court held the twins continued to be in need of assistance and ordered that placement remain with foster care through DHS. The court increased supervised visitation to twice a week.

The father and mother each appeal.

In CINA proceedings, we review the evidence de novo. In re J.R.H., 358 N.W.2d 311, 317 (Iowa 1984). Of paramount concern is the welfare and best interests of the child. In re D.L., 401 N.W.2d 201, 202 (Iowa App. 1986). We 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 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).

We 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). Of

paramount concern is the welfare and best interests of the child. In re N.M.W., 461 N.W.2d 478, 480 (Iowa App. 1990).

C.A.E. and J.J.E. were adjudicated in need of assistance pursuant to Iowa Code section 232.6(c)(2) (1991), which provides a "child in need of assistance" to be a child "who has suffered or is imminently likely to suffer harmful effects" as a result of the parent's failure to exercise reasonable care in supervising the child. In determining the welfare and safety of the child, we may gain insight from parents' past performance. In re Dameron, 306 N.W.2d 743, 745 (Iowa 1981). Abusive action toward other siblings can be the basis of an adjudication of a child not directly abused. In re Long, 313 N.W.2d 473 (Iowa 1981).

We need not wait until harm actually befalls these children. N.E. has a long history of inability to care for her children. Her parental rights to two children have been terminated, and a third child died at six weeks of age. The paternal grandmother testified to the inadequate care N.E. provided the child who died. In addition, the significant services provided to N.E. with her three older children did not improve her parenting skills. For example, she could not operate an apnea monitor, which may be needed with the twins. N.E. also could not understand safety issues nor comprehend child development.

Based on our review of the record, we conclude the juvenile court's determination of C.A.E. and J.J.E. to be

children in need of assistance is supported by clear and convincing evidence.

Although N.E. and J.C. appeal the CINA adjudication separately, they live together, intend to continue living together, and intend to parent together. Therefore, we carefully review J.C.'s decision to reside with and parent with N.E. when reviewing this adjudication. Our chief concern in this case is J.C.'s failure to protect C.A.E. and J.J.E. from the harm they are imminently likely to suffer in the joint care of N.E. We find, in fact, his failure to protect the children from N.E. clear and convincing evidence to support the juvenile court determination of the children to be in need of assistance.

We also note that during appellate oral arguments, J.C. raised a procedural issue regarding proper notice of the adjudicatory hearing since his paternity had not been formally established. However, J.C. fails to provide us with record of or reference to this issue on appeal. See Iowa R. App. P. K1(a)(3). Accordingly, we deem this issue waived and affirm the trial court in all respects.

AFFIRMED.