FILED
NOV 26 1991
CLERK SUPREME COURT

**IN THE COURT OF APPEALS OF IOWA**

No. 1-396 / 91-408

**IN THE INTEREST OF B.K.** and **C.K.**, Minor Children,

**C.K.**, Father,

Appellant.

341

---

Appeal from the Iowa District Court for Woodbury County, Brian L. Michaelson, Juvenile Referee, and William E. Adams, District Associate Judge.

Father appeals both the juvenile court dispositional order suspending visitation between him and his son and daughter and the district court order affirming and modifying it. **REVERSED IN PART AND AFFIRMED IN PART AS MODIFIED.**

David L. Reinschmidt of Munger, Reinschmidt & Carter, Sioux City, for appellant father.

Bonnie J. Campbell, Attorney General, John M. Parmeter, Special Assistant Attorney General, and Judy Sheirbon, Assistant Attorney General, for appellee.

Heard by Oxberger, C.J., and Schlegel and Hayden, JJ.

**SCHLEGEL, J.**

We are concerned here with two children: a boy, B.K., born September 7, 1979; and a girl, C.K., born August 16, 1984. Their parents were formerly married to each other, but the marriage was dissolved in 1988. The dissolution decree placed the two children in the mother's primary physical care. The parents have had ongoing conflicts regarding visitation.

In June 1990 both children were adjudicated to be children in need of assistance pursuant to Iowa Code section 232.2(6)(c)(1) (mental injury caused by a parent). The primary factual basis for the CINA adjudication was the ongoing bitterness and stress between the two parents over visitation and other issues. The juvenile court noted the mother alleged that the father had sexually abused the girl; the juvenile court did not clearly express a view on the credibility of these sexual abuse claims, but the court found the claims had not been proven by clear and convincing evidence.

The CINA adjudication provided that, pending a dispositional hearing, the children would remain in the mother's care and would have weekly supervised visits with the father. Between the time of the CINA adjudication and the time scheduled for a dispositional hearing, the daughter allegedly made further complaints to her mother of sexual abuse by the father. These complaints concerned inappropriate touching during supervised visitation. In

the dispositional order the juvenile court once again noted the claims of sexual abuse but failed to comment clearly on the credibility of such claims. The dispositional order permitted the children to remain in the mother's care and provided that the father would have no visitation with the children until such time as the children request visitation and the children's therapists and guardian ad litem agree that visitation would not harm the children. In addition, the dispositional order directed the father to undergo counseling with a therapist "knowledgeable in the area of sexual abuse."

The father sought district court review of the juvenile court referee's dispositional order. The district court upheld most aspects of the dispositional order but modified it to reinstate the father's supervised weekly visitation with the son "upon the same terms and conditions that existed prior to the" dispositional order.

The father has appealed the dispositional order and the district court order upholding most of its provisions. The father asserts the State failed to prove by clear and convincing evidence that he had sexually abused his daughter. Therefore, he argues, his visitation rights should be reinstated, and the requirement that he undergo counseling should be eliminated.

Review of orders entered after a child has been adjudicated a child in need of assistance is de novo. In Interest of S.R.A., 440 N.W.2d 619, 620 (Iowa App. 1989).

We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

I.

We first address the father's visitation rights with respect to his son, B.K. The father, Charles, appealed the juvenile court order to the associate district court. On February 7, 1991, the court affirmed the juvenile court, except that it changed visitation with B.K. to be "reinstated upon the same terms and conditions that existed prior to the order appealed from." Charles had requested judicial review "of that Order entered by the Honorable Brian L. Michaelson, Juvenile Court Referee dated October 1, 1990 and filed October 2, 1990." The juvenile court order "prior to the order appealed from" was an August 15, 1990, order suspending all visitations between Charles and the children "pending issuance of the ten-day complete report of the on-going child abuse investigation." The juvenile court referee further determined

> [I]n the event the child abuse investigation results in a founded report, then the visitations will remain suspended pending further order of this Court. . . . [I]n the event that the child abuse investigation is either undetermined or unfounded, then the visitations between the father and children are to resume in accordance with the June 27, 1990, adjudicatory order of this Court.

The author of the March 21, 1991, case permanency plan interpreted the associate district's ruling:

> [A] District Court appeal order upset [B.K.] and [his mother] as they felt it stated that [Charles] could have unsupervised visits with [B.K.].

> This worker consulted the Assistance [sic] County Attorney for legal advice on the District Court order. It is the interpretation of the Assistant County Attorney that visitation between [B.K.] and his father revert to an August 15, 1990 order. (This was the last order before the Dispositional Order.) The August 15 order suspends all visits between [Charles] and the children.

The father contends this interpretation is preposterous. He points out that the associate district court order also stated that visitation should be reinstated and that "[t]his Court believes that the record does not support cancellation of [B.K.'s] visitation rights by the father." Charles argues the court clearly intended for B.K. to see his father.

The State believes we cannot consider any issue arising from the district court's order that is not properly part of the record because this issue involves events occurring after the filing of the notice of appeal. The State suggests Charles should seek clarification from the district court. Charles filed notice of appeal on March 6, 1991. On April 2, 1991, he moved the district court to expand its February 7, 1991, order regarding B.K.'s visitation. The Woodbury Associate District Court ruled on April 29, 1991, that it had "lost jurisdiction to expand or otherwise modify its Appeal Ruling and Order, dated February 7, 1991, when the father appealed to the Supreme Court."

We believe the question of correct interpretation of the associate district court's order is properly before

this court. The court determined that Charles should have visitation rights with B.K. We reinstate this visitation and adopt the terms as set out in the CINA adjudication order of June 27, 1990. Charles may have weekly two-hour visitations with B.K. These visitations shall be supervised by the ongoing caseworker, the ongoing caseworker's supervisor, or a family therapist. B.K. has stated that he prefers supervised visits with his father. We determine on de novo review the above visitation plan is proper in light of the evidence before the juvenile court.

II.

We next address visitation with C.K. After the juvenile court's June 27, 1990, order, the children were placed in the care and custody of their mother, and their father was allowed supervised visitation as noted above. Charles did then exercise two supervised visitations on July 25 and 31, 1990. A counselor with Catholic Charities, Edward Hunt, was present throughout these visits. In early August 1990 C.K.'s mother brought to the attention of the Iowa Department of Human Services' caseworker, Nancy Freeman, that during the July 25 visit Charles had sexually abused C.K. The allegation was that Charles placed his hand on C.K.'s "bottom."

The juvenile court ordered that Charles undergo therapy with "an individual therapist knowledgeable in the area of sexual abuse" and that he be allowed no visitation with the children until such time as the children requested it and

the children's therapists and the guardian ad litem determined such visits would be beneficial to the children. The juvenile court did not specifically find any evidence of sexual abuse. In fact, the two prior sexual abuse allegations have been found groundless by the district court and the juvenile court under the clear and convincing evidence standard. This third allegation resulted in the dispositional hearing of October 1, 1990.

The testimony at the dispositional hearing of Constance Larson, therapist for Catholic Charities, indicated that C.K. considers her armpits, stomach, and back as her "private parts." She did not want to be touched in those areas by her father. The evidence suggests Charles's touching of C.K. during the supervised visit constituted picking her up and sitting her on his lap. Hunt testified that he saw nothing inappropriate.

The Iowa Department of Human Services found that sexual abuse occurred in all three allegations. The Woodbury County District Court and the Woodbury County Juvenile Court have both found no basis for the first and second allegations made against Charles. We accept and agree with the courts' decision that Charles is innocent of sexual abuse. He should not have to live the rest of his life battling these unproven and unfounded allegations. We make clear that Charles is adjudicated innocent of the sexual abuse charges; the State has not proved he committed sexual abuse by clear and convincing evidence. See In Interest of S.R.A., 440 N.W.2d 619, 621 (Iowa App. 1989).

We determine that visitation with C.K. should also be reinstated and adopt the same procedures as with B.K. Charles may have weekly two-hour supervised visits with C.K. Charles requests supervised visits in order to protect himself from further sexual abuse allegations.

III.

The juvenile court's October 1, 1990, ruling required Charles to see an "individual therapist knowledgeable in the area of sexual abuse" every one to two weeks. Charles states he has refused sexual abuse counseling since he feels such submission would constitute an admission of guilt on his part. The Department of Human Services' caseworker testified that Charles must admit to sexual abuse prior to acceptance into the counseling program: "That perpetrator program will not take people unless they admit to some degree that they have a problem or that there is a problem with that. He has consistently denied that."

The State argues that in light of C.K.'s statements to professionals indicating she feels her father touched her in a sexually abusive way, it is reasonable for the court to order the father to see a therapist in this area. Because we accept above the courts' decisions that Charles is innocent of the sexual abuse charges, we do not feel he should be <u>required</u> to go through such therapy. We feel Charles should work with C.K. and avoid behavior that makes her uncomfortable; he needs to understand her feelings and make changes to help alleviate her stress and emotional

harm. He should not, however, be required to admit he is a sexual abuser and participate in the "perpetrator program."

IV.

This family has had problems over the years. We believe, however, that those problems do not emanate from Charles's alleged sexual abuse. The courts have cleared him of these charges, and the dysfunction of the family certainly cannot be solved by separating him from the children. We reverse the court's ruling affirming the juvenile court on all issues except with regard to B.K.'s visitation, and on that issue we modify and expand the court's order.

**REVERSED IN PART AND AFFIRMED IN PART AS MODIFIED.**