IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 1999-264 (9-494) / 98-1479
Filed November 10, 1999

IN THE INTEREST OF B.O. AND A.O.,
Minor Children,

T.D., Mother,
Appellant.

Appeal from the Iowa District Court for Tama County, Susan F. Flaherty, Associate Juvenile Judge.

The mother of two minor children appeals a juvenile court dispositional order.

AFFIRMED IN PART AND REVERSED IN PART.

Chad R. Frese of Moon Law Office, Marshalltown, for appellant.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, and Brent D. Heeren, Assistant County Attorney, for appellee State.

Patrick L. Wilson, Marshalltown, for father L.O.

Mark W. Lindholm, Marshalltown, guardian ad litem for minor children.

Heard by Streit, P.J., and Vogel and Vaitheswaran, JJ., but decided by Streit, P.J., and Hecht and Vaitheswaran, JJ.

STREIT, P.J.

The mother of Andrew O. and Benjamin O. manipulated her sons into conflict with their father. The district court adjudicated Benjamin a child in need of assistance under Iowa Code sections 232.2(6)(b) and 232.2(6)(c)(2) and modified the dispositional order regarding Andrew by granting the father primary custody. We reverse the district court's adjudication of Benjamin under section 232.2(6)(b) as it lacked clear and convincing evidence of imminent physical harm and affirm its adjudication as to section 232.2(6)(c)(2) and its modification of the dispositional order.

I. Background Facts & Proceedings.

Andrew and Benjamin are the children of Lonnie O. and Tammy D. In 1993 the court adjudicated Andrew, the eldest, a child in need of assistance (CINA) based on two founded reports of physical abuse. The parents retained physical custody of Andrew, but were forced to participate in a number of programs designed to improve their parenting skills. Andrew's younger brother, Benjamin, was not subject to the CINA proceeding.

In 1994 Lonnie and Tammy separated, with Tammy having physical custody of the children. During the pendency of the dissolution, the parties' relationship eroded beyond mutual disagreement and soon became fraught with extreme friction. Both parents began using the children as tools against one another. Over the next year, the Iowa Department of Human Services (DHS) offered both parties numerous

services. Lonnie made considerable improvements, while Tammy's progress was minimal. Tammy continued to unduly influence the children, hoping to drive a wedge between Lonnie and the children. Tammy would praise Andrew for refusing to go on visitation with his father, she told him she was proud of him for kicking his father, and used him in teaching Benjamin to do the same. She also filed numerous unfounded allegations of physical abuse and neglect against Lonnie, thus exposing the children to repeated questioning by police officers and child abuse investigators. Tammy changed Andrew's therapist without notifying Lonnie or DHS. In the initial interview with the new therapist, she demanded Andrew be subjected to psychological evaluation despite clinical evidence to the contrary, showed the therapist photos of bruises on Andrew's body that DHS had earlier dismissed as resulting from play, and recounted a shocking and unfounded tale of Lonnie locking her and Andrew in a closet for three days without food and water.

In response to Tammy's continued efforts to undermine Lonnie's relationship with the children, DHS found Tammy responsible for denying the children critical care. DHS, supported by medical evidence, found Tammy's actions caused repeated emotional harm to the children. In 1996 the State filed a CINA petition alleging Benjamin had been neglected and suffered harmful effects as a result of Tammy's failure to exercise a reasonable degree of care in supervising Benjamin. At the dispositional hearing, Tammy's attorney was alleged to have improperly communicated with one of the children. Both Tammy and Lonnie recounted separate

instances were Tammy's trial counsel spoke with the children ex parte. Counsel vehemently denied either conversation took place. The district court concluded Benjamin was a child in need of assistance under Iowa Code sections 232.2(6)(b) and 232.2(6)(c)(2) and it was in the children's best interest that Lonnie be awarded physical care.

Tammy appeals contending (1) the juvenile court erred in finding Benjamin was a child in need of assistance (2) the juvenile court erred in concluding it would be in the children's best interest if physical care was transferred to Lonnie, and (3) she was denied effective assistance of counsel throughout the CINA proceedings.

II. Child in Need of Assistance.

A. Standard of Review. 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 are the welfare and best interests of the child. *In re D.L.*, 401 N.W.2d 201, 202 (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) (1997). 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 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).

B. The Merits. The district court adjudicated Benjamin a child in need of assistance under Iowa Code sections 232.2(6)(b) and 232.2(6)(c)(2) (1997). A child

is in need of assistance under section 232.2(6)(b) if the parent with which the child resides has neglected the child or is imminently likely to neglect the child. Neglectful abuse is "any nonaccidental physical injury suffered by a child as a result of the acts or omissions of the child's parent." Iowa Code § 232.2(42) (1997). Physical injury is defined in the Iowa Administrative Code as:

> [D]amage to any bodily tissue to the extent that the tissue must undergo a healing process in order to be restored to a sound and healthy condition or damage to any bodily tissue to the extent that the tissue cannot be restored to a sound and healthy condition or damage to any bodily tissue which results in the death of the person who has sustained the damage.

Iowa Admin. Code r. 441-175.21. The State urges Benjamin is imminently likely to suffer physical injury due to the inherently hostile atmosphere created by Tammy's actions. Simply creating a plausible scenario whereby Benjamin could potentially be injured does not rise to the level of imminent likelihood. The State relies on a series of inferences that when stacked upon one another cannot support its own weight. Andrew's kicking and bad behavior towards his father does not infer imminent danger of physical injury to Benjamin. It is not clear nor is this court convinced that Benjamin was a child in need of assistance due to physical abuse or neglect.

A child is in need of assistance under section 232.2(6)(c)(2), if the child has suffered or is imminently likely to suffer harmful effects as a result of "[t]he failure of the child's parent . . . to exercise a reasonable degree of care in supervising the child." To satisfy section 232.2(6)(c)(2) the State must prove by clear and convincing evidence that (1) Tammy failed to exercise a reasonable degree of care in supervising

Benjamin, and (2) as a result Benjamin suffered or was imminently likely to suffer harmful effects. Because clear and convincing evidence supports the adjudication of Benjamin as a child in need of assistance on both points, we affirm the district court's adjudication.

Part of Tammy's supervision included the guiding of her children into physical conflict with their father. This illustrates her lack of concern for the proper development of Benjamin. Her failure to provide reasonable care is further evidenced by subjecting her children to repeated child abuse investigations completely lacking in merit. Reasonable care in supervising a child includes rising above feelings of animosity and promoting a healthy relationship between father and child. It further includes protecting young children from unnecessary investigations by law enforcement. Tammy's failure to place her children's psychological well-being over her unsatiable desire to exact revenge on her ex-husband cannot possibly be described as a reasonable degree of care. The result of her vindicative game was not an ex-husband utterly defeated but a child forced to suffer emotional harm. Having to repeatedly explain foundless allegations of abuse to law enforcement and the embarrassment of having officers take photographs of every nick and scratch on his body clearly exposed Benjamin to psychological harm. Furthermore, the wedge driven by Tammy through the father-son relationship prevented Benjamin from forming a healthy relationship with his father. The district court's adjudication of Benjamin as a child in need of assistance under Iowa Code section 232.2(6)(c)(2) is

supported by clear and convincing evidence. Tammy failed to exercise reasonable care in supervising Benjamin, and Benjamin suffered identifiable harm as a result. The district court is affirmed as to its adjudication under section 232.2(6)(c)(2).

III. Modification of Custody.

A. Standard of Review. We review de novo the change of an original child in need of assistance order. *In re R.F.*, 471 N.W.2d 821, 824 (Iowa 1991).

B. The Merits. To modify a dispositional order, conditions must so materially and substantially change that modification is in the child's best interests. *In re D.S.*, 563 N.W.2d 12, 14 (Iowa App. 1997). Conditions surrounding Andrew's life materially and substantially changed due to Tammy's actions. Since the original dispositional order, Tammy was found in contempt of court for hindering visitation, encouraged Andrew to refuse visitation and physically assault his father, exposed Andrew to repeated questioning about unfounded abuse, and unilaterally changed Andrew's therapist without consi ing either DHS or the father. Tammy's panoply of unreasonable actions materially and substantially changed the conditions surrounding the original dispositional order. Due to these material and substantial changes, it was in Andrew's best interests to modify custody and place him with his father. Tammy's actions subjected Andrew to emotional harm by exposing him to repeated questioning by law enforcement and by attempting to destroy any relationship with his father. The father, conversely, made significant improvements to his parenting skills and demonstrates a more healthy relationship with the children.

The district court properly concluded it was in Andrew's best interests to modify custody and place him with his father.

IV. Ineffective Assistance of Counsel.

A. Standard of Review. We review de novo constitutional claims of ineffective assistance of counsel. *In re D.P.*, 465 N.W.2d 313, 314 (Iowa App. 1990).

B. The Merits. Our ultimate concern in claims of ineffective assistance is with the "'fundamental fairness of the proceeding whose result is being challenged.'" *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 696 (1984)). The burden is on the mother to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Risdal*, 404 N.W.2d at 131-32. An ineffective assistance of counsel claim may be disposed of if she fails to prove either prong. *See State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Therefore, we may affirm the CINA adjudication based on her failure to prove prejudice without deciding whether her counsel failed to perform an essential duty. *See State v. Hoeck*, 547 N.W.2d 852, 863 (Iowa App. 1996). The test for prejudice is whether counsel's failure worked to Tammy's actual and substantial disadvantage to the extent a reasonable probability exists that but for the trial attorney's unprofessional errors, the result would have been different. *See State v. Johnson*, 534 N.W.2d 118, 128 (Iowa App. 1995). A reasonable probability is one sufficient to undermine confidence in the outcome. *See State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996).

Tammy cannot carry her burden of proving prejudice by a preponderance of the evidence. The district court, although admonishing the attorney for calling into question the credibility of his client, did not rely on any alleged misdeeds by counsel in forming its conclusions. The district court had ample evidence to support its findings and made no mention of the allegations in its order. Because Tammy cannot prove prejudice by a preponderance of the evidence, her claim of ineffective assistance of counsel must fail.

V. Conclusion.

The adjudication of Benjamin as a child in need of assistance due to neglectful abuse was not supported by clear and convincing evidence. The district court's adjudication under section 232.2(6)(b) is reversed. However, there is clear and convincing evidence that due to Tammy's failure to provide reasonable care Benjamin suffered emotional harm. The district court is affirmed as to its adjudication under section 232.2(6)(c)(2) and its modification of the dispositional order regarding custody. Finally, Tammy's claim of ineffective assistance of counsel is without merit.

AFFIRMED IN PART AND REVERSED IN PART.