**IN THE COURT OF APPEALS OF IOWA**

No. 1-480 / 00-1824
Filed December 12, 2001

FILED
DEC 1 2 2001
CLERK SUPREME COURT

**IN THE INTEREST OF S.E., M.E., and A.E., Minor Children,**

**A.E., Mother,**
**Appellant.**

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Appeal from the Iowa District Court for Dubuque County, Jane Mylrea, District Associate Judge.

The mother of three minor children appeals a juvenile court order adjudicating them as children in need of assistance. **AFFIRMED.**

Thomas P. Schlapkohl and Stephanie L. Brick Drey of Brick, Gentry, Bowers, Stoltze, Schuling & Levis, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Linda Channon Murphy, Student Intern, and Jean A. Becker, Assistant County Attorney, for appellee State.

Heard by Huitink, P.J., and Zimmer, J., and Habhab, S.J.

**HABHAB, S.J.**

Appellant Alexandra Eisbach, natural mother of S.E., M.E. and A.E., appeals their August 25, 2000 adjudication as Children in Need of Assistance (CINA) under Iowa Code sections 232.2(6)(b) (2000) and 232.2(6)(c)(2), and the October 23, 2000 dispositional order following that CINA adjudication. The mother claims on appeal that the facts upon which the court relied in making its CINA adjudication were not clear and convincing evidence, and that even if the facts supported, by clear and convincing evidence, the court's conclusions regarding certain incidents involving her children, these incidents did not rise to the required level of abuse/neglect or imminent abuse/neglect necessary for a CINA adjudication. We affirm.

Alexandra Eisbach and David Eisbach were divorced in March of 1998 and have three children, S.E., born April 2, 1990; M.E., born July 1, 1992; and A.E., born December 29, 1994. Their dissolution decree awarded David, who lives in Dubuque, physical custody of the children and Alex, who lives in Des Moines, visitation every other weekend. After one of their scheduled visitations with their mother in March of 2000, David noticed M.E. had a cut on his head, and his current wife, Jenny Kress Eisbach, noticed that S.E. had bruises on his arm. After asking S.E. how the injuries had occurred and hearing various accounts including that he had hit a doorknob and that the dog had done it, S.E. stated, "Kahn did it." Kahn is the mother's live-in companion whom she considers her common-law husband. David and Jenny reported the alleged abuse by Kahn to the children's school principal, who then interviewed the children. After a several conflicting accounts regarding the origin of the injuries,

and the prompting by Jenny to "tell the truth," S.E. told the principal that Kahn had done it when he "yanked" him off of a table and dragged him into his room during the children's visit with their mother.

Following a meeting with the school principal, the Department of Human Services became involved. Child protective worker Lisa Foley interviewed the children in Dubuque at the father's home. S.E. reported to the social worker that his bruises had resulted from rough treatment by Kahn. S.E. additionally reported, detailing three incidents, that Kahn suffocated him with pillows and blankets as a form of discipline. M.E. told the worker that Kahn had pushed him into walls and that the cut on his head was evidence of this.

Subsequently, the children were interviewed by Carol Nigh of the St. Luke's Child Protection Center. In those interviews S.E. spoke of the "suffocation" discipline used by Kahn, M.E. spoke of Kahn's throwing him into walls and reinforced S.E.'s story that Kahn employed suffocation as a form of discipline. A.E. spoke of hearing S.E. scream in reaction to Kahn's injurious treatment, and also related that Kahn had once dropped her on her bed, causing her to hit her head on a bar.

Since April of 2000 the children have been in therapy. In therapy, S.E. and M.E. related their fear of Kahn's discipline and his history of abusive treatment, although testimony indicated that that fear was abating and M.E. was expressing interest in reuniting with Kahn. Kahn received a continued no-contact order regarding the children upon the August 25 CINA adjudication. This order was reduced to supervised visitation on October 23, 2000.

On appeal the children's mother Alex contends that there was not clear and convincing evidence of the abuse. Alex lists several reasons supporting this claim, among them the following: that the children had given many conflicting accounts regarding how they received their injuries; that the accusations against Kahn were the last among several reasons for their injuries, and according to Ph.D. witness Sannito, the least reliable; that the children had been goaded by their bitter father and his wife into claiming abuse by their mother's boyfriend/common-law spouse; that the children are known for having vivid imaginations; that the children were merely involved in horseplay with Kahn and bruise easily; that the children's jealousy of Kahn motivated them to frame him; and that caseworker Lisa Foley had a personal vendetta against the mother and possibly conducted a biased investigation of the abuse.

We review the evidence in a CINA adjudication de novo. *In Interest of B.B.*, 500 N.W. 2d 9, 11 (Iowa 1993) (citation omitted). The welfare and best interests of the child are the governing concerns. *Id.* The state has the burden to prove the allegations of the petition by clear and convincing evidence. Iowa Code §232.96(2). Although we are not bound by the trial court's findings of fact, we give weight to them, especially those regarding the credibility of witnesses. Iowa R. App. P. 14(f)(7).

In its August 25 CINA adjudication the juvenile court found that there was clear and convincing evidence that S.E. had suffered physical abuse at the hands of Khan by his throwing him on his bed and suffocating him with blankets and pillows to get him to behave. The court also found clear and convincing evidence of abuse of M.E. by Khan in his pushing him into a wall and causing

him to cut his head. Further, given these circumstances, the court found that A.E. was at imminent risk of abuse, qualifying her for the CINA adjudication as well, under the principle that, given the harm inflicted on two of the children in the family, the third was at imminent risk of harm. *See In the Interest of B.B.*, 598 N.W. 2d 312, 316 (Iowa Ct. App. 1999). The court further justified its finding by referring to Iowa Code section 232.2(6)(c)(2) and finding all three of the children were in imminent danger due to their mother's failure to intervene on their behalf when Kahn was physically abusing them.

We agree with the district court that there is clear and convincing evidence of Kahn's abuse, and we find that the court's adjudication of S.E., M.E., and A.E. as children in need of assistance was merited under these circumstances. We recognize that the children's conflicting stories regarding the causes of their injuries may weigh against a finding of abuse, especially considering witness Dr. Sannito's expert opinion that the first explanation of an injury is more accurate than later explanations, but we also recognize that this is not the first example of a child giving several reasons for his injuries, all of them intended to divert attention from what turns out to be the actual cause of them, namely physical abuse.

In this case clear and convincing evidence of abuse outweighs the doubt created by the children's conflicting stories. Testimony by child protective worker Lisa Foley of the Department of Human Services indicated that S.A. gave a very detailed account of Kahn's method of suffocating him, or "suffercating," him as S.A. so aptly termed it. S.A. was able to bolster his claims against Kahn by describing the three different ways (holding a blanket over his face, holding a

pillow over his face, and pressing his head into the mattress) in which he was suffocated. Furthermore, bruises on S.A.'s arm, which were "circular and in the pattern of what a hand might be," were consistent with S.A.'s story that Kahn would grab him and drag him to his bedroom, and inconsistent with earlier stories that they were caused by the dog or by falling into a doorknob. In his interview with Foley, M.A. also was able to vouch for S.A.'s claims of suffocation, as well as to establish that he too was subjected to abusive discipline, resulting in his getting cut on the head.

CDC social worker, Carol Nigh, who interviewed all three of the children, and who spent time ensuring that they knew what "truth" was, also concluded from the children's own experiences and observations that they were the subjects of Kahn's abusive behavior, that they weren't merely misunderstanding "horseplay," or lying, but that their claims were legitimate. She recommended, in fact, that they have no further contact with Kahn.

The trial court was able to assess the credibility of these two social workers, as well as that of Kahn, who testified, and both David and Alex, who also testified. The trial court, after having the opportunity to listen to accounts of the children's differing claims, to observe all parties, and to hear Kahn testify, was not persuaded that the allegations against Kahn were false or manufactured, or even exaggerated. Given the physical evidence and the conclusions of social workers Foley and Nigh, we agree that there was clear and convincing evidence that Kahn inflicted the injuries the children claimed he did and that Alex failed to intervene.

Appellant further claims on appeal that even if there is clear and convincing evidence that Kahn perpetrated the acts the children claimed he did, those acts do not rise to the level of abuse or imminent danger of abuse as required under Iowa Code section 232.2(6)(b) to justify a CINA adjudication. Alex cites various cases in which visible marks resulting from spanking were not considered by the court to be conclusive evidence of child abuse. *See Hildreth v. Iowa Dep't. of Human Services*, 550 N.W. 2d 157, 159 (Iowa 1996). If punishment inflicting visible injury does not qualify as child abuse, argues Alex, certainly suffocation, which S.E. apparently fully recovered from scar-free, cannot rise to the level of abuse either. We disagree. Clearly the use of pillows and blankets to cut off the oxygen supply of a child for an extended period of time, coupled with the infliction of visible physical injuries including bruising one child while dragging him and causing another child to hit his head, are indeed abuse and qualify these children, as well as their younger sibling, for a CINA adjudication. *See Iowa Code* § 232.68(2); Iowa Admin. Code r. 441-175.1. We find there is sufficient evidence of abuse in this case to justify a CINA adjudication of all three children under Iowa Code section 232.2(6)(b). *See B.B.*, 598 N.W. 2d. at 316.

Alex argues in the alternative that there is insufficient evidence to adjudicate her children CINA due to her failure to supervise them under Iowa Code section 232.6(c)(2). Having found that there is enough evidence of abuse, with or without her failure to supervise, we need not address this issue. We note, however, that there is clear and convincing evidence, as the district court found, that Alex failed to supervise her children. An interview with M.E. revealed that

when Kahn was being abusive, M.E. believed his mother wouldn't do anything about it. Exhibits at trial indicated that Alex knew of the abuse but did nothing to change it, and the evidence shows she tried to silence her children. We agree with the district court on this issue.

**AFFIRMED.**