FILED
AUG 27 1992
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-317 / 92-190

IN THE INTEREST OF M.J., T.J., and M.J., Minor Children,

J.L.J. and G.K.J., Parents,

Appellants.

Appeal from the Iowa District Court for Wapello County, Gene W. Glenn, Judge.

The parents appeal from an adjudication and subsequent dispositional order finding their children to be children in need of assistance pursuant to Iowa Code sections 232.2(6)(b) and 232.2(6)(c)(2). **AFFIRMED.**

J.L.J. and G.K.J., Ottumwa, pro se.

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

Timothy W. James, Ottumwa, guardian ad litem for the children.

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

DONIELSON, J.

On August 12, 1991, Tanya,[1] born in 1978, was arrested for shoplifting. Her sister, Mary,[2] born in 1977, was present when Tanya was arrested, but she was not directly involved in the incident. Following this incident, the children's father, Joe,[3] spanked both the girls, leaving extensive bruises on Tanya's buttocks and thighs. Mary also sustained a few small bruises on her buttocks. The mother, Gwen,[4] was present in the house during this time. A child abuse investigation of this incident was conducted and resulted in a founded report.

On August 27, 1991, the State filed a child in need of assistance petition as to Tanya, Mary and Mindy,[5] born in 1980. The petition alleged the children were at risk of abuse or neglect because of Joe's propensity to use physical discipline and Gwen's inability to prevent such discipline.

On September 27, 1991, the juvenile court held an adjudicatory hearing. The parents were represented by an

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1. T. is the child's first initial. Tanya is not her given name.

2. M. is the child's first initial. Mary is not her given name.

3. J. is the father's first initial. Joe is not his given name.

4. G. is the mother's first initial. Gwen is not her given name.

5. M. is the child's first initial. Mindy is not her given name.

attorney and the children were represented by a guardian ad litem who was also an attorney. All parties consented to the CHINA adjudication based upon the child abuse report. The juvenile court found all three children were children in need of assistance pursuant to Iowa Code §§ 232.2(6)(b) and (6)(c)(2) (1991). The juvenile court ordered the children to remain in their parents' custody and ordered the parents to refrain from using any physical punishment upon the children. In addition, the juvenile court ordered the family to participate in family services and undergo psychological evaluations, and ordered the father to undergo substance abuse evaluations.

On January 8, 1991, following a dispositional hearing, the juvenile court filed its findings and order. The dispositional hearing involved only Mary and Mindy. The parents had placed Tanya in an inpatient center for treatment and evaluation and her dispositional hearing was continued. The parents requested the court to terminate its jurisdiction in this matter and the court declined. The juvenile court ordered Mary and Mindy to remain in their parents' custody. The juvenile court repeated its order prohibiting physical punishment and ordering family services.

On February 3, 1992, the parents, proceeding pro se, filed a notice of appeal. On February 13, 1991, Justice Carter overruled the parents' request for immediate temporary stay of the dispositional hearing.

On February 19, 1992, the juvenile court filed its dispositional order concerning Tanya. The parents appeared pro se at the hearing. The juvenile court ordered Tanya to remain in the custody of her parents. The juvenile court again repeated its order regarding physical punishment and family services.

On April 6, 1992, Senior Judge Reynoldson entered an order stating Tanya's adjudication status would be reviewed simultaneously with the status of the other children. In addition, the court stated it would not consider papers and testimony in the parents' appendix and brief which did not appear in the record relating to the appeal.

The parents appeal, pro se, from the CHINA adjudication and the subsequent dispositional order. The parents contend there was not clear and convincing evidence that the mother neglected the children and that the father physically abused the children. The parents further contend they and their children were denied effective assistance of counsel. The parents also assert a number of errors relating to the conduct of child abuse investigators and the conduct of the juvenile court. The State responds that the parents have failed to properly preserve error on these issues. We affirm the juvenile court.

Before discussing the arguments presented by the parents, we note throughout the appellants' brief, the parents fail to cite to the appendix, as required by Iowa Rule of Appellate Procedure 14(g). The failure to cite to

the appendix prevents the reviewing court from determining to what portion of the record the parents are referring. In addition, we note the parents failed to comply with Iowa Rule of Appellate Procedure 14(a)(5), failing to state how the issues they raised were preserved for review. The failure to address issue preservation requires the reviewing court to make an independent determination on each issue.

> We cannot permit substantial departures from statutory appellate procedures on the basis a lay person is handling his own appeal. The legislature has made no such exception. The ultimate result of that policy would be a chaotic breakdown in our judicial system.

State v. Dunham, 232 N.W.2d 475, 477 (Iowa 1975). The appellants are admonished to adhere to the Iowa Rules of Appellate Procedure.

Appellate review of a juvenile court's finding of a child in need of assistance is de novo. In re J.R.H., 358 N.W.2d 311, 317 (Iowa 1984). Of paramount concern is the welfare and best interest of the child. In re D.L., 401 N.W.2d 201, 202 (Iowa App. 1986). In determining what is in the best interest of the child, the court necessarily looks at the present conditions and past performance "for that performance may be indicative of the quality of the future care that parent is capable of providing." In re Dameron, 306 N.W.2d 743, 745 (Iowa 1981). See also In re Loeffelholz, 162 N.W.2d 415, 419 (Iowa 1968).

The reviewing court 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, on review, the court is not bound by the findings of the juvenile court, "we give weight to the juvenile court's findings of fact because the juvenile 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).

I. **CHINA Adjudication.** The parents contend there was not clear and convincing evidence that the mother neglected the children and that the father physically abused the children. Specifically, the parents assert there cannot be a finding of child abuse without physical evidence or when there is contradictory testimony. The parents contend a physical spanking cannot constitute child abuse.

A "child in need of assistance" is a child who has suffered physical abuse by a parent or who has suffered, or is imminently likely to suffer, harmful effects as a result of the failure of the child's parent to exercise a reasonable degree of care in supervising the child. Iowa Code §§ 232.2(6)(b), (6)(c)(2) (1991). "Physical abuse" includes any nonaccidental physical injury suffered by a child as the result of the acts of the child's parent. Iowa Code § 232.2(38) (1991).

We find the record clearly supports the juvenile court's judgment. Tanya and Mary both suffered bruises as a result of their father's spanking. In addition, Mary was forced to watch Joe spank her sister, Tanya. Interviews with the children indicated the father had used physical punishment previously, at times using a cribbage board. The mother has been aware of these incidents, but expressed no concern and believed the children "deserved the spanking."

We do not agree direct physical evidence of the abuse is required. Iowa R. App. P. 14(f)(16). While parents do retain the right to inflict corporal punishment, this right must be exercised reasonably. In re W.G., 349 N.W.2d 487, 488 (Iowa 1984). By inflicting bruises, we would not find the above incident to be reasonable corporal punishment. The record contains clear and convincing evidence showing the children have suffered harm as a result of their father's physical abuse and their mother's neglect.

II. **Ineffective Assistance of Counsel.** The parents contend they and the children were denied effective assistance of counsel. They assert they were prejudiced by their attorney when he consented to the CHINA adjudication by the juvenile court. They further assert their children were prejudiced by their guardian ad litem because he was unable to represent their best interests.

A. Counsel's Representation of the Parents. We first address the parent's argument regarding their own counsel. In a CHINA proceeding, a party claiming ineffective assistance of counsel must show (1) that counsel's performance was deficient, and (2) that actual prejudice resulted. Unless both showings are made, the claim must fail. In re D.W., 385 N.W.2d 570, 579-80 (Iowa 1986) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 674, 693 (1984)).

As we find the juvenile court properly adjudicated the children in need of assistance based upon their father's physical abuse and the mother's neglect, there is no showing of any prejudice by counsel's having consented to the CHINA adjudication. We find the parents were not denied effective assistance of counsel.

B. Guardian Ad Litem for the Children. The parents also argue the guardian ad litem provided ineffective assistance to the children. Again, a party claiming effective assistance of counsel must show (1) that counsel's performance was deficient, and (2) that actual prejudice resulted. See In re J.V., 464 N.W.2d 887, 893 (Iowa App. 1990).

As the record contains no indication that the children had differing interests from each other, it was proper for the guardian ad litem to represent all three of the children. Putting aside questions of the parents' standing to raise this issue, we find the guardian ad litem's

representation of the children was effective. We find no showing of any prejudice towards the children by any of the actions taken by the guardian ad litem.

III. Actions of the Juvenile Court Referee. The parents contend the juvenile court erred in (1) prompting testimony from a child abuse investigator without putting her under oath; (2) allowing a newspaper reporter in the courtroom; (3) ordering the parents to refrain from using physical discipline; and (4) ordering the father to undergo substance abuse counseling.

Regarding all of these issues, we do not believe error was properly preserved. We are unable to find a record of any objections to these issues. The failure to object to the above improprieties is a waiver of those issues. Without a proper objection, the issue is not properly before the appellate court. See Dunahoo & Thomas, Preservation of Error and Making the Record in the Iowa Criminal Trial and Appellate Processes, 36 Drake L. Rev. 45, 69-70 (1986-87)(citing State v. Johnson, 272 N.W.2d 480, 483 (Iowa 1978)). The appellate court will not review issues which were not presented to the district court. State ex rel. Iowa Dep't of Human Serv. v. Duckert, 465 N.W.2d 871, 873 (Iowa 1991). Therefore, we will not address these issues.

IV. Actions of the Child Abuse Investigators and the County Attorney. The parents also assert other numerous errors relating to the conduct of the county attorney and the child abuse investigators. They assert the child abuse investigators abused their authority when they conducted their investigation and failed to comply with a letter from the Director of Human Services. The parents also contend a letter written from the Wapello County Multi-Disciplinary Team to Governor Branstad prejudiced them.

Pursuant to Senior Judge Reynoldson's order, we will not consider papers and testimony in the parents' appendix and brief which did not appear in the record relating to the appeal. All documents regarding such issues outside the record cannot be considered by the reviewing court.

Furthermore, we will not address these issues because it does not appear they were raised or preserved in the trial court. There have been no proceedings in the lower court in which the State has had an opportunity to counter the parents' alleged errors. The appellate court will not review issues which were not presented to the district court. State ex rel. Iowa Dep't of Human Serv. v. Duckert, 465 N.W.2d 871, 873 (Iowa 1991). Therefore, we determine these issues are without merit.

We determine any other issues the parties may have raised are either covered by this opinion or are without merit.

The costs of this appeal are taxed to the parents, Joe and Gwen.

For all the reasons stated, we affirm the juvenile court.

AFFIRMED.

Habhab, J., concurs; Oxberger, C.J., specially concurs.

OXBERGER, C.J. (special concurrence)

I do not make a judgment whether the parental spankings constituted physical abuse of a child. The parents through their attorney consented to a CHINA adjudication. They did not advise the trial court the attorney's action was contrary to their wishes. They may not raise that issue for the first time on appeal.