IN THE COURT OF APPEALS OF IOWA

No. 5-498 / 94-2080

FILED
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CLERK SUPREME COURT

IN THE INTEREST OF A.P., A Minor Child.

C.P., Mother, **and P.P.**, Father,

Appellants.

Appeal from the Iowa District Court for Marion County, Thomas W. Mott and Norman R. Hays, Judges.

The parents appeal from an order adjudicating their daughter a child in need of assistance pursuant to Iowa Code sections 232.2(6)(b) and 232.2(6)(c)(2) (1993). **AFFIRMED.**

Matthew S. Sheeley and Alfredo Parrish of Parrish, Kruidenier, Moss, Dunn, Montgomery & Thomas, Des Moines, for appellants.

Thomas J. Miller, Attorney General, Debora L. Hewitt, Assistant Attorney General, and Phil Reser, Assistant County Attorney, for appellee State.

Gayle Nelson Vogel of Johnson, Lane & Vogel, Knoxville, for appellee minor child.

Heard by Hayden, P.J., and Habhab and Huitink, JJ.

HABHAB, J.

Paul and Char are the parents of A.P., born March 19, 1994. On June 12, 1994, Paul was taking care of A.P. and her two half-siblings. A.P. was fine when she and Paul and her siblings visited her grandparents for lunch.

Paul took A.P. upstairs at about 2 p.m. A.P. was fussy when Paul tried to put her down for a nap. A.P.'s stepbrother came upstairs and got A.P. He fed her a bottle, changed her diaper and laid her down on the carpeted floor. While A.P. slept, A.P.'s stepsister used her foot to roll A.P. over. A.P. started to cry. Paul was unable to console A.P. thereafter. Char came home from work at about 4:30 p.m. and was also unsuccessful in quieting A.P. Char noticed A.P. was not moving her left arm.

At about 9 p.m., Char took A.P. to the emergency ward. The examining physician suggested A.P. was developing an ear infection. He told Char to check with their family doctor in a few days if her condition did not improve.

On June 14 the family doctor, Kurt Vander Ploeg, ordered x-rays because A.P. cried as soon as he manipulated her left arm. Char told Vander Ploeg the arm may have been injured when the stepsister rolled A.P. over. Vander Ploeg noted there were no bruises, welts, or other external indications of injury. The x-rays showed A.P. had suffered a midshaft fracture of her left humerus (upper arm bone). The injury was reported to the Department of Human Services (DHS) as suspicious.

A temporary no contact order was issued against Paul on June 15. His motion to vacate the no contact order was denied on July 13. However, it was modified to

allow supervised visitation between Paul and A.P.

At the hearing on the State's petition to have A.P. adjudicated a child in need of assistance (CINA), Mark Gillespie, an investigator with Child Protective Investigations, testified about his investigation and his conclusion that Paul was responsible for A.P.'s broken arm. His child abuse report was admitted over the parents' objections. Several doctors testified. The stepsister testified she was responsible for A.P.'s broken arm.

A.P. was adjudicated CINA on September 26, 1994. The juvenile court evaluated the testimony of the nine witnesses and concluded the circumstantial evidence was clear and convincing that Paul physically abused A.P. The court noted Paul's temper and his history of memory lapses, seizures, and depression. The court concluded the parents' proffered explanations for the injury were not credible. A subsequent dispositional order confirmed the adjudication.

The parents appeal.

I. ***Scope 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 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) (1993). 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).

II. ***Evidentiary Issue.*** The parents first contend the juvenile court erred in admitting the complete child abuse report into evidence at the adjudicatory hearing. The report in question was prepared by Mark Gillespie who began his investigation on June 14, 1994 and completed his report on September 14, 1994. Iowa Code section 232.71(7) (1993) requires a complete report to be filed within ten working days of receipt of the abuse report unless the juvenile court grants an extension for good cause shown. In admitting the report, the juvenile court found section 232.71(7) is silent as to whether an extension may be granted after the time has run out and, in addition, section 232.71(7) does not make a late report inadmissible.

After the report was admitted, the juvenile court made the following statement:

> [Attorney for the parents] has a legitimate point raised with the inability to adequately prepare to represent his clients when he gets the important information the day before or the day of the trial. I think it would advance the search for the truth in this hearing to not exclude evidence. Court will receive the evidence. *At the end of the day, if necessary, we can adjourn the hearing to give counsel appropriate time to make preparations to review the evidence.*

(Emphasis added). The parents did not request additional time at the end of the day to review the evidence and make further preparations.

If we reach the same result as the juvenile court, but for different reasons, we will affirm. *Anderson v. Yearous*, 249 N.W.2d 855, 863 (Iowa 1977). We may affirm for any proper ground for which support is found in the record. *Langner v.*

Mull, 453 N.W.2d 644, 647 (Iowa App. 1990).

We decline to review the grounds relied upon by the juvenile court in reaching its decision. Rather, we find the district court must be affirmed because no prejudice has been shown. *See In re C.D.*, 508 N.W.2d 97, 100 (Iowa App. 1993). The juvenile court provided the parents with the opportunity to request additional time to keep the record open. The parents chose to not make such a request. As the parents did not avail themselves of the opportunity to remedy any disadvantage they allegedly suffered, they cannot be deemed to have been prejudiced by the admission of the report.

III. ***Statutory Criteria.*** The parents contend the district court erred in finding A.P. was CINA pursuant to Iowa Code sections 232.2(6)(b) and 232.2(6)(c)(2) (1993). Iowa Code section 232.2(6) provides:

> "Child in need of assistance" means an unmarried child:
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> . . . .
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> b. Whose parent, guardian or other custodian, or other member of the household in which the child resides has physically abused or neglected the child, or is imminently likely to abuse or neglect the child.
> c. Who has suffered or is imminently likely to suffer harmful effects as a result of either of the following:
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> . . . .
>
> 2) The failure of the child's parent, guardian, custodian, or other member of the household in which the child resides to exercise a reasonable degree of care in supervising the child.

The State has the burden of establishing these grounds by clear and convincing evidence. Iowa Code § 232.96(2) (1993). The provisions of chapter 232 are to be

liberally construed to protect the welfare of the child. *In re B.B.*, 440 N.W.2d 594, 596 (Iowa 1989). The welfare and best interests of the child are the governing concerns. *J.R.H.*, 358 N.W.2d at 317. Although the parents have a legitimate interest in the integrity of the family unit, the interest is not absolute. *In re B.B.*, 500 N.W.2d 9, 12 (Iowa 1993); *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981).

Extensive expert medical evidence was provided regarding A.P.'s injury. Dr. Kurt Vander Ploeg[1], the family physician for A.P.'s family and a witness for the parents, testified A.P.'s fracture was unusual in the sense that any fracture suffered by a three-month-old child is unusual. Dr. Vander Ploeg also testified it is easier for an adult to suffer the fracture suffered by A.P. than it is for a child. Dr. Lee Henry, a radiologist[2] and witness for the State, testified he did not believe there was any possibility the fracture could have occurred from rolling A.P. over. Dr. Henry also testified A.P.'s fracture is more common in adults than in infants due to the elasticity of an infant's bones. He testified A.P.'s fracture is "an extremely rare fracture for an infant to sustain." Finally, Dr. Henry stated A.P.'s type of fracture is one of the most common forms of bone trauma in child abuse. Dr. Wilbur Smith, a physician at the University of Iowa, found A.P.'s fracture could not have been caused by rolling A.P. over.

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[1] Dr Vander Ploeg stated he had not had pleasant previous experiences with DHS and was dissatisfied with the whole child abuse reporting system.

[2] Dr Henry, in the course of his residency, received exposure to and training in diagnosing nonaccidental trauma to children.

The family pastor stated he had never witnessed Paul being physically violent toward his children and did not believe Paul was capable of it. Paul, on the other hand, admits administering corporal punishment. In addition, Paul's stepdaughter testified Paul yelled at and hit his stepson. The stepdaughter testified the stepson cried after being hit and was sometimes afraid of Paul. The juvenile court made the following findings regarding Paul:

> The evidence inexorably points to [A.P.]'s father, as one who either contributed to the broken arm, or knew how it happened and failed to seek medical care for it. [A.P.]'s father has a nasty temper. He strikes his small stepson. He has memory lapses and keeps a seizure problem under control with medicine. He vehemently cites scripture in support of the desirability of corporally punishing children for their own good. I conclude that [A.P.] is a child whose parent or other member of the household has physically abused or neglected her, or who failed to exercise a reasonable degree of care in supervising her.

The court further found:

> Paul's exited, angry, vehement manner in his testimony denying that he strikes his son, daughter, or wife with a closed fist, but that he does spank the children when they talk back, citing the Bible as his commandment to do so, makes one fear for the safety of people under his control without protection.

We reiterate that while our review is de novo and 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. *S.V.*, 395 N.W.2d at 668.

We find there was clear and convincing evidence A.P. should be adjudicated CINA pursuant to Iowa Code sections 232.2(6)(b) and 232.2(6)(c)(2). Upon

consideration of all arguments raised by the parties on appeal, we affirm the ruling of the juvenile court.[3]

AFFIRMED.

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[3] There is a motion pending filed by the State regarding the appendix submitted by appellants. The State's motion to strike appellants' appendix is overruled. Costs for the appendices are assessed to appellants.