IN THE COURT OF APPEALS OF IOWA

No. 1-517 / 91-254

FILED
JAN 29 1992
CLERK SUPREME COURT

475

IN THE INTEREST OF N.J.P. and D.D.P., Minor Children,

J.P., Father,

Appellant.

Appeal from the Iowa District Court for Polk County, Vincent M. Hanrahan, Judge.

Father of two children appeals a CINA adjudication and the subsequent dispositional order. **AFFIRMED.**

Charles J. Davoren of Murray, Davoren & Jankins, Des Moines, for appellant father.

Bonnie J. Campbell, Attorney General; John M. Parmeter, Special Assistant Attorney General; and Kathrine S. Miller-Todd, Assistant Attorney General, for appellee State.

Susan Conn, Des Moines, guardian ad litem for the children.

Considered by Donielson, P.J., and Hayden and Sackett, JJ.

DONIELSON, P.J.

The father of two children, a girl born in July 1980, and a boy born in July 1982, challenges an order finding them to be children in need of assistance. The children's parents are separated after a fourteen-year marriage, and a dissolution action is pending. There is considerable animosity and hostility between the parents. After the parents separated, complaints were made that the father had sexually abused these two children and their older sister. The older sister has been adjudicated to be a child in need of assistance, and she is not involved in these proceedings.

In March 1990, the State filed a petition seeking to have the boy and girl adjudicated children in need of assistance. The petition alleged the girl had been sexually abused and, on that basis, was a child in need of assistance under Iowa Code section 232.2(6)(d) (1991). The petition alleged the male child was not receiving adequate care or supervision and, therefore, was a child in need of assistance under Iowa Code section 232.2(6)(c)(2) (1991). At the start of the trial, the court permitted the State to amend its petition to allege that the male child was a child in need of assistance as defined by Iowa Code section 232.2(6)(d) as well.

Following a hearing, the juvenile court found that both children had been sexually abused by their father. Accordingly, the court found both to be children in need of assistance under section 232.2(6)(d). The court also found

the male child had been given inadequate care and supervision and, as such, was a child in need of assistance under section 232.2(6)(c)(2).

The court placed the children in the mother's home and ordered that they be supervised by the Department of Human Services. The father appeals contending (1) the State should not have been granted leave to amend its petition and (2) the evidence was not sufficient to establish he had sexually abused either child.

Our review of the juvenile court's findings is de novo. In re J.R.H., 358 N.W.2d 311, 317 (Iowa 1984). We affirm the juvenile court.

I. **Amendment to the Petition.** We first address the father's argument that the juvenile court erred in granting the State leave to amend the petition by adding the allegation that the boy had been sexually abused. The father contends he was denied adequate notice of the contents of the petition by the timing of the amendment. He claims this alleged lack of notice violated his due process rights. On our review, we are not persuaded that the father's due process rights were violated.

The original petition was filed on March 20, 1990. Also in March of 1990, the boy began to allege that his father had sexually abused him. A child abuse report concerning these allegations was determined to be founded on April 5, 1990. The hearing on the CINA petition was not held until August 30, 1990, well over four months after the founded

child abuse report regarding the sexual abuse allegations was made. As the trial began, the State made its motion for leave to amend the petition pursuant to Iowa Rule of Civil Procedure 88. The State sought to add the allegation of sexual abuse as an alternative basis for a finding that the boy was a child in need of assistance. The trial court granted the State's motion over the father's objection, but the father did not request that the case be continued.

The parent-child relationship is constitutionally protected. Quilloin v. Walcott, 434 U.S. 246, 255, 98 S. Ct. 549, 554, 54 L. Ed. 2d 511, 519 (1978); Wisconsin v. Yoder, 406 U.S. 205, 233, 92 S. Ct. 1526, 1542, 32 L. Ed. 2d 15, 35 (1972). The State must meet due process requirements in a termination of parental rights procedure. See Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 1394, 71 L. Ed. 2d 599, 606 (1982). Due process requires sufficient notice of the complaint against the parent and of the time of the hearing. See Alsager v. District Court, 406 F. Supp. 10, 17-21 (S.D. Iowa 1975).

We believe the father had known for over four months that his son was alleging the father sexually abused him. Indeed, the father exercised discovery on this issue. The boy's audiotaped interview, the child abuse report, and the boy's depositions had all been available to the father. Certainly, the father could not have been surprised by the State's motion to amend the petition to include these allegations. Were he truly surprised, he surely could have

requested a continuance. We do not believe the father's due process rights were violated.

II. **Clear and Convincing Evidence.** The father's next contention is there is not clear and convincing evidence he sexually abused his children. He contends our review of the evidence should be more stringent, because the allegation only surfaced after he became engaged in a bitter dissolution proceeding with the children's mother and the children were in her custody. We recognize some authorities contend there is a greater probability of false accusations of sexual abuse in a dissolution context. See, e.g., Green, True and False Allegations of Sexual Abuse in Child Custody Disputes, 25 J. Am. Acad. Child Psychiatry 449, 449-50 (1986); Benedek & Schetky, Allegations of Sexual Abuse in Child Custody and Visitation Disputes, in Emerging Issues in Child Psychiatry and the Law 145, 155 (D. Schetky & E. Benedek eds. 1985). While there is need for concern about fabricated allegations of child sexual abuse in the context of custody and visitation disputes, concern should not turn to exaggeration. John E.B. Myers et al., Expert Testimony in Child Sexual Abuse Litigation, 68 Neb. L. Rev. 1, 113 (1989). The child testified after the fact that her father had touched her in an inappropriate manner, had touched her with his penis and had placed his finger in her vagina. The medical evidence was consistent with the child's story.

The trial court believed the child's testimony, and when considering the credibility of witnesses in a child in need

of assistance case, we give weight to the fact findings of the trial court. Iowa R. App. P. 14 (f)(7). We affirm the finding the father sexually abused the children. Furthermore, the father has not challenged the finding his son received inadequate care and supervision. Accordingly, the juvenile court's finding the boy is a child in need of assistance is also affirmed.

The costs of this appeal are taxed to the father.

For all the reasons stated, the judgment of the juvenile court is affirmed.

AFFIRMED.

Hayden, J., concurs; Sackett, J., concurs in part and dissents in part.

SACKETT, J. (concurring in part and dissenting in part)

I concur in part and dissent in part. I concur with the majority the children should have been found to be children in need of assistance. I disagree, however, that due process requirements were met when the State was allowed to amend its petition to alleged additional grounds at time of trial.