IN THE COURT OF APPEALS OF IOWA

FILED
NOV 30 1983
CLERK, SUPREME COURT

Filed
November 30, 1983

IN THE INTEREST OF C.S.H. AND M.C.H.,
Minor Children

M.C.H. and S.L.H., Parents,
Appellants.

3-344
69597

Appeal from Marshall District Court, Sandra J. Holien, District Associate Judge.

The juvenile court found two children to be children in need of assistance and directed that they be placed in foster care. AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

William L. Springer, Marshalltown, for parents (appellants).

Thomas J. Miller, Attorney General, and Brent Hege, Assistant Attorney General, for the appellee State.

William J. Lorenz, Marshalltown, guardian ad litem for the children (appellee).

Heard by Oxberger, C.J., and Snell and Sackett, JJ.

OXBERGER, C.J.

The juvenile court found two children to be children in need of assistance and directed that they be placed in foster care. The parents have appealed. They contend that the evidence did not support the CHINA adjudication and that in any event the removal of the children from their parents' custody was an unnecessarily harsh disposition. We affirm in part, reverse in part, and remand.

I. CHINA Adjudication

Appellate review of CHINA proceedings is de novo. Iowa R. App. P. 4; In Interest of Welcher, 243 N.W.2d 841, 843 (Iowa 1976). We accord weight to the findings of the juvenile court, particularly where the credibility of witnesses is at issue; however, we are not bound by these findings. In Interest of Dameron, 306 N.W.2d 743, 745 (Iowa 1981).

Proceedings pursuant to a CHINA adjudication are not penal in nature, and this is reflected in the standard of proof required of the State. Allegations supporting a CHINA adjudication need not be proven beyond a reasonable doubt, but rather need only be proven by "clear and convincing" evidence. Iowa Code § 232.96(2). The term "clear and convincing" means the establishment of facts "by more than a preponderance of the evidence, but something less than establishing a factual situation beyond a reasonable doubt." In re Henderson, 199 N.W.2d 111, 121 (Iowa 1972). For evidence to be "clear and convincing," it is merely necessary that there be no serious or substantial doubt about the correctness of the conclusion drawn from it. See Words and Phrases, Permanent Edition, vol. 7, at 623-24.

The matter at issue is whether the State has proved the children to be children in need of assistance as defined in Iowa Code sections 232.2(5)(b) and

(5)(g). Those sections are as follows:

> 5. "Child in need of assistance" means an unmarried child:
>
> . . . b. Whose parent, guardian or other custodian has physically abused or neglected the child, or is imminently likely to abuse or neglect the child.
>
> . . . g. Whose parent, guardian, or custodian fails to exercise a minimal degree of care in supplying the child with adequate food, clothing or shelter and refuses other means made available to provide such essentials.

Iowa Code §§ 232.2(5)(b) and (5)(g)(1983).

The evidence in the case at bar supports the CHINA adjudication. The shelter provided the children had been generally inadequate. Testimony indicated the inside of the house was replete with flies and bugs. The insects had bitten the children so that infection had set in and impetigo resulted. The social worker testified that there were cockroaches crawling over the food in the cupboards. The children were being bathed in cold water because a water heater in the trailer the mother subsequently moved into was "on the blink." During a physical examination of the children, the doctor indicated that both children lacked normal growth and development; the children were not bathed; the boy showed evidence of middle ear infection; the children had low blood counts; both children had diaper rash; the girl showed evidence of strep throat. The doctor testified he was unable to make a follow-up examination as the mother failed to return the children for their appointment and failed to bring in proper stool samples for evaluation. The doctor indicated that the condition of the children was consistent with an inadequate nutritional diet. With the foregoing as support, our de novo review convinces us that the State has met its burden. We, therefore, affirm the finding of the juvenile court that these children are children in need of assistance.

II. Custody

The parents contend that the juvenile court erred in ordering the custody of the minor children to be transferred to the Department of Social Services for

placement in foster care as such disposition was unnecessarily harsh. We agree.

Iowa Code section 232.99(3) states:

> 3. When the dispositional hearing is concluded the court shall make the least restrictive disposition appropriate considering all the circumstances of the case. The dispositions which may be entered under this division are listed in sections 232.100 to 232.102 in order from least to most restrictive.

Iowa Code § 232.99(3)(emphasis added). We do not believe foster care was the least restrictive disposition under these circumstances. Roberta Harris, the social worker, testified that the mother sought out assistance from the WIC food program. This would indicate that she was concerned about the nutritional needs of her family. Harris also testified that she thought the children would be better cared for with "some other parenting skills, some homemaker services, as well as someone to monitor medical needs." This indicates that some sort of "in home" monitoring would be acceptable at this point. Doctor Reinertson testified that, notwithstanding the earlier examination, as of this point in time the children looked healthy and were clean; their immunizations were up to date; stool tests were negative; the children's blood counts were close to normal. The doctor stated that in his last several visits with the children there was no evidence of poor hygiene and the mother had kept all scheduled appointments. The doctor indicated that a program could be set up to closely monitor the children's nutritional and medical needs within the home. Furthermore, an investigative finding on September 19, 1982, showed that the parents had taken major steps to improve their home environment.

The evidence further indicates that the mother has showed marked improvement in her ability to care for the children. She has testified that she is willing to work with the social service people. The father testified that he wants

to reconcile with his wife and that he is willing to go through a conciliation process. Evidence indicates he is able and wants to work and that he is actively seeking employment. He has testified that he will do everything required to adequately care for his children. Furthermore, there is no evidence that the children have ever been physically abused.

After reviewing all the evidence, we find the parents have voiced an honest desire to keep their children and do what is necessary to provide for their care. We believe a program can be set up which will allow adequate supervision in order to monitor the medical and nutritional needs of the children within the home. We do not believe the evidence supports the finding of out-of-home disposition at this time. See Iowa Code §§ 232.101, 232.102(3). We, therefore, reverse that portion of the juvenile court's ruling and remand the case to the juvenile court to enter a dispositional order in accordance with this opinion.

We caution the parents of these children, however, that their behavior will be determinative of the success or failure of this adjudication. We would strongly advise them to be attentive to the children's needs, or otherwise risk the loss of custody of the children at some future point in time.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.