IN THE COURT OF APPEALS OF IOWA 000287

No. 7-696 / 97-0401
Filed February 25, 1998

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CLERK SUPREME COURT

IN THE INTEREST OF C.R. AND E.R., Minor Children,

R.R. and K.R., Parents,
Appellants.

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

The parents appeal from district court orders in child in need of assistance (CINA) cases finding their children to be in need of assistance and ordering them placed in foster care. **AFFIRMED.**

R.T. Starken of Alexander & Starken, Ottumwa, for appellants.

Thomas J. Miller, Attorney General, Chris Odell, Assistant Attorney General, and Rose Anne Mefford, Assistant County Attorney, for appellee State.

R.E. Breckenridge of Johnson, Hester, Walter, Harrison & Breckenridge, L.L.P, Ottumwa, guardian ad litem for minor children.

Considered by Huitink, P.J., and Streit and Mahan, JJ.

STREIT, J.

Parents appeal the adjudication of their daughter as a child in need of assistance and the transfer of legal custody of both of their daughters to the Department of Human Services (DHS) for foster placement. Because the children are in imminent danger of being abused, neglected, or harmed if they remain in the home, we affirm the trial court.

I. Background & Facts.

Kim and Ron are the parents of Crystal, born February 3, 1993, and Elizabeth, born January 10, 1996. Ron has a history of domestic violence, child abuse, sexual misconduct, and substance abuse. Kim is mentally retarded, chronically depressed, and has a history of psychiatric hospitalizations and violence when she stops taking her medicine. She has made numerous suicide threats.

In May of 1996, Elizabeth was adjudicated a child in need of assistance (CINA), but was allowed to remain with her parents. The CINA determination was based on a founded report of child abuse after Elizabeth suffered a skull fracture. Later that year, a founded report for denial of critical care was made after Elizabeth ingested cigarette butts while in Ron and Kim's care. On January 17, 1997, the State filed a motion for change of disposition requesting Elizabeth's legal custody be transferred to DHS for foster care placement. The motion was granted.

In January of 1997, the State filed a CINA petition regarding Crystal. The petition alleged Crystal was imminently likely to be abused or neglected or to suffer

harmful effects from living with her mother. Crystal was adjudicated a child in need of assistance pursuant to Iowa Code sections 232.2(6)(b), (c)(2), and (n). After dispositional hearing, legal custody of Crystal was transferred to DHS for foster care placement. The parents appeal Crystal's adjudication as a child in need of assistance and placing the children in the legal custody of DHS for foster care placement.

II. Standard of Review.

Our review of an action arising from CINA proceedings is de novo. *In re D.S.*, 563 N.W.2d 12, 14 (Iowa App. 1997); Iowa R.App.P. 4. We give weight to the fact findings of the juvenile court, especially when considering the credibility of the witnesses, but we are not bound by these findings. *Id.*

III. CINA Under Iowa Code Section 232.2 (6)(b),(c)(2) & (n).

The parents argue Crystal was incorrectly adjudicated a child in need of assistance under Iowa Code sections 232.2 (6)(b), (c)(2) & (n). A child in need of assistance is defined under Iowa Code Section 232.2(6)(b) &(c) as an unmarried child:

> b. Whose parent, guardian, 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:
>
> (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.

Iowa Code § 232.2(6)(b)(c) (1997).

A child in need of assistance under section 232.2(n) is defined as an unmarried child: "Whose parent's or guardian's mental capacity or condition, imprisonment, or drug or alcohol abuse results in the child not receiving adequate care." *Id.* at § 232.2(n).

The record is replete with evidence Crystal is imminently likely to be abused if she stays at home with her parents. Kim has a history of violent and abusive behavior toward herself and others. She repeatedly assaulted her husband, as he did her. After engaging in a sexual threesome between herself, her husband, and a sixteen year-old babysitter, she threatened to kill the babysitter and the babysitter's siblings with a machete if they told anyone about the sexual encounter. She has threatened to slash her wrists in front of Crystal and has made repeated suicide attempts. She has locked Crystal in a closet for up to two hours for misbehavior. She has thrown Crystal off the bed causing Crystal to hit her head on the bed frame.

There is no reason to believe Crystal will be spared from physical abuse in this household. The State must act to prevent probable harm to the child and need not delay until actual physical harm has occurred. *In re T.C.*, 522 N.W.2d 106, 108 (Iowa App. 1994).

There is clear and convincing evidence Crystal is likely to suffer harm due to lack of supervision if she remains at home with her parents. Her younger sister

Elizabeth suffered an unexplainable skull fracture and ingested cigarette butts while in the care of her parents. The parents lack of supervisory judgment threaten the children's emotional as well as their physical well-being. For example, the parents engage in debauchery, such as the sexual encounter with the babysitter, while Elizabeth and Crystal are home.

There is overwhelming evidence Kim's mental illness and Ron's drug and alcohol abuse has resulted in Crystal not receiving adequate care. Kim has been off her medication for months and refuses to go to her appointments to be prescribed medication. Ron has a lengthy and severe history of alcohol and drug use. It was determined he needed inpatient treatment, but he denies he needs treatment or that his substance abuse effects his parenting skills. These conditions have led to much of the abuse and neglect in this family.

After de novo review, we find the court did not err in adjudicating Crystal a child in need of assistance.

IV. Legal Custody of Children to DHS for Foster Care Placement.

The parents argue the court erred in giving legal custody of their children to DHS for foster home placement. Ron contends the CINA petition did not give him adequate notice he may lose custody of Crystal.

The juvenile court entered an ex parte order for DHS to take temporary custody of the Crystal and Elizabeth. Such an order is allowed when three conditions are met:

> [1] . . . [T]here is reasonable cause to believe that a request for consent would further endanger the child, or there is reasonable cause to believe that a request for consent will cause the parent, guardian, or legal custodian to take flight with the child.
> [2] It appears . . . immediate removal is necessary to avoid imminent danger to the child's life or health.
> [3] There is not enough time to file a petition and hold a hearing under section 232.95.

Iowa Code § 232.78(1)(a)-(c) (1997).

The facts of this case justified an ex-parte order for immediate temporary removal of the children from the household, without notice to Ron. The children were in imminent danger.

After the dispositional hearing the court entered an order transferring the legal custody of the children to DHS. A transfer of custody is proper when there is clear and convincing evidence that:

> a. The child cannot be protected from physical abuse without transfer of custody; or
> b. The child cannot be protected from some harm which would justify the adjudication of the child as a child in need of assistance and an adequate placement is available.

Iowa Code § 232.102(5)(a)-(b) (1997).

Continuation in the home of their parents would not have been in Crystal and Elizabeth's best interests. In fact, it would have been contrary to their welfare. Placement in foster care is necessary to protect the children from physical and mental abuse, and neglect.

Placing the children in foster care will allow Kim time to treat her mental illness. Ron needs time to treat his substance abuse. Both parties need to attend counseling, including sexual abuse therapy. After the parties undergo treatment, hopefully, they will be capable of adequately parenting their children.

AFFIRMED.