IN THE COURT OF APPEALS OF IOWA

No. 5-292 / 94-1602

FILED
JUL 25 1995
CLERK SUPREME COURT

IN THE INTEREST OF K.M., A Minor Child,

K.E., Mother,
Appellant.

Appeal from the Iowa District Court for Johnson County, Sylvia Lewis, District Associate Judge (adjudication), and John R. Sladek, District Associate Judge (dispositional order).

Mother appeals the district court's order adjudicating her minor son a child in need of assistance pursuant to Iowa Code section 232.2(6)(b) (1993) (child whose parent has physically abused or is likely to physically abuse child) and its dispositional order placing the child with his father. **AFFIRMED.**

Dennis A. Bjorklund, Iowa City, for appellant.

Bruce D. Nestor, Iowa City, for appellee-father.

Thomas J. Miller, Attorney General, Gordon E. Allen, Deputy Attorney General, Judy Sheirbon, Assistant Attorney General, and Debra Minot, Assistant County Attorney, for appellee-State.

Eleanor M. Dilkes of Weideman & Dilkes, guardian ad litem for minor child.

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

HABHAB, J.

Karen and Roy, Sr., are the divorced parents of Kirby, born October 15, 1980, and two other children. Karen was awarded sole physical custody of the children pursuant to the dissolution decree. In late 1993, Karen, her current husband, Michael, and the children moved from Des Moines to North Liberty. Roy, Sr., resides in Des Moines.

On April 28, 1994, Kirby allegedly brought knives to his school and Karen was called to take him home. At home Karen asked Kirby to give her the knives. Kirby refused and an argument ensued. Karen struck Kirby with her belt. Kirby and Karen then exchanged blows and Michael grabbed Kirby and restrained him on the floor. When Michael released him, Kirby again hit Karen. This time Karen restrained Kirby on the floor and hit him several times with her fists. Michael called 911 at Karen's request.

The police arrived, talked with Kirby, Karen, and Michael, and suggested Kirby be taken to the University of Iowa Hospitals and Clinics (UIHC) for psychiatric evaluation. Karen and Michael followed this suggestion. A social worker at the UIHC made a report of child abuse, the police were informed, and Kirby was placed in a shelter in Ottumwa. After a shelter hearing on May 2, Kirby was placed with Roy, Sr.

On May 18, 1994, a child in need of assistance (CINA) petition was filed. At the August 1994 adjudicatory hearing Lois Lee, a child abuse investigator with the

Department of Human Services (DHS), testified she concluded the report of physical abuse was founded in Kirby's case. Officer Robert Dolezal, who investigated the reported abuse, testified he had observed visible marks on Kirby's face and body when he spoke with Kirby the morning after the incident. Karen and Michael testified Kirby did not appear to be in pain when she hit him with her belt and that Kirby hit Karen in the face several times.

The court found Karen's "methods of discipline were inappropriate and resulted in physical injury" to Kirby. Therefore, the court adjudicated Kirby to be a child in need of assistance pursuant to Iowa Code section 232.2(6)(b) (1993).

Karen's application for an interlocutory appeal of this order was denied.

After a dispositional hearing in September, the court placed Kirby with Roy, Sr., and allowed Karen supervised visitation.

Karen appeals.

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 is 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). 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). 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. ***Physical Abuse***. Karen's first contention is there was not clear and convincing evidence of physical abuse. Rather, she contends she was administering corporal punishment when she struck Kirby.

A parent who inflicts corporal punishment or discipline to the point of causing nonaccidental physical injury can be found to have physically abused the child and be sufficient grounds for a CINA action. *See In re W.G.*, 349 N.W.2d 487, 492 (Iowa 1984). Physical abuse or neglect is defined in Iowa Code section 232.2(42) (1993) as "any nonaccidental physical injury suffered by a child as the result of the acts or omissions of the child's parent, guardian or custodian or other person legally responsible for the child." For purposes of child abuse investigations regarding allegations of physical abuse, Iowa Administrative Rule 441-175.1 further defines "nonaccidental injury" as follows:

> "Nonaccidental physical injury" shall mean an injury which was the natural and probable result of a caretaker's actions which the caretaker could have reasonably foreseen, or which a reasonable person could have foreseen in similar circumstances, or which resulted from an act administered for the specific purpose of causing an injury.

We find the requirements of section 232.2(42) for physical abuse have been met.

The act of physical abuse in this case took place when Karen restrained Kirby on the floor and hit him in the face with her fists three or four times. Karen could have reasonably foreseen her blows would cause the injuries in this case.[1] We recognize parents have a right to administer corporal punishment. *In re W.G.*, 349 N.W.2d 487, 487 (Iowa 1984). This right must be exercised reasonably. *Id.* This case, however, does not involve the reasonable administration of corporal punishment. Rather, we conclude the facts before us describe a parent losing control. When asked what she wanted to accomplish by hitting Kirby while he was restrained, Karen stated, "To tell you the truth, I had nothing in mind. My mind went blank. I really wasn't trying to accomplish anything but to restrain him and stop him from squirming and trying to get away."

We find corporal punishment was not the intent behind Karen's blows to Kirby's face and head. We further find these blows were not necessary to restrain Kirby since Karen was already sitting on top of him. We conclude there was clear and convincing evidence Kirby was physically abused.

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[1] Photographs taken at the hospital of Kirby show injuries to the face and head. Lynn Sigler, a DHS worker who transported Kirby from the hospital to a shelter, testified the injuries to Kirby's face were worse than the photographs indicate. Sigler stated, "Well, I think these photographs show how the bruises -- I was really amazed at how severe the bruises appeared to me. The staff in Ottumwa had a similar reaction. I think they were more severe than what these photographs show."

III. ***Placement***. Karen also argues Kirby should not have been temporarily placed with Roy, Sr., in Des Moines. Karen contends the least restrictive alternative was not implemented by the district court.

The DHS social history report made a recommendation that Kirby be temporarily placed with his father with protective supervision from DHS. In so doing, the report found Kirby wanted to remain with his father, the father had been adequately caring for Kirby, and Karen had not yet addressed the problems she has with Kirby.

At the disposition hearing, the guardian ad litem recommended Kirby remain with Roy, Sr. The guardian ad litem stated the father had been adequately caring for Kirby, and expressed concern that Karen had not begun counseling yet and had not accepted responsibility for what had happened.

We conclude the district court properly decided placement with Karen would be inappropriate at this time. We further find the district court properly placed Kirby in his father's temporary custody.

We affirm the district court on all issues brought before this court.

AFFIRMED.