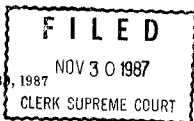


IN THE COURT OF APPEALS OF IOWA



IN THE INTEREST OF M.D.,
Minor Child,

) Filed November 30, 1987

) $\frac{7-436}{87-274}$

P R D, Natural Father,

)

Appellant.

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Appeal from the Iowa District Court for Marion County (No. J4-128B),
Thomas Mott, District Associate Judge.

The natural father appeals from a juvenile court order finding the minor
child to be a child in need of assistance under Iowa Code sections 232.2(6)(b)
and 232.2(6)(c)(2). **AFFIRMED.**

Robert A. Nading II of Ankeny for P.R.D.

Thomas J. Miller, Attorney General; Charles K. Phillips, Assistant Attorney
General; and Steve Cotton, Assistant County Attorney, for the State.

Claire B. Patin of Elgin, Hoyman, Clogg & Patin of Indianola, for natural
mother

James Vernon Hicks of Knoxville for M.D.

Considered by Oxberger, C.J., and Danielson and Sackett, JJ.

OXBERGER, C.J.

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This appeal arises from a child-in-need-of-assistance (CINA) proceeding. The natural father challenges the order finding the minor child to be in need of assistance under Iowa Code sections 232.2(6)(b) and 232.2(6)(c)(2) and allowing him only supervised visitation. He alleges: (1) the evidence was insufficient to find the child in need of assistance; (2) the juvenile court erred by restricting the father's visitation immediately after the adjudicatory hearing; (3) the court erred by failing to dismiss the petition when the father, the State, and the child's attorney moved to dismiss the petition; (4) the court erred by failing to fashion the least restrictive remedy after the dispositional hearing; and (5) the court erred by reversing its previous ruling that the county would pay for the court-ordered evaluation of the parents and stepparents. We affirm.

In CINA proceedings we review the evidence de novo. In Interest of J.R.H., 358 N.W.2d 311, 317 (Iowa 1984); In re Blackledge, 304 N.W.2d 209, 210 (Iowa 1981). The welfare and best interests of the child are paramount. J.R.H., 358 N.W.2d at 317. The State must prove its allegations by clear and convincing evidence. Iowa Code § 232.96(2) (1987).

The father, Randy, challenges the sufficiency of the evidence presented by the State. He argues the evidence is insufficient to prove the minor child, M.D., was abused by her stepmother or that Randy could have foreseen or prevented any of the injuries. We are convinced the State has proved its case.

The first incident in question involves the presence of bruises on both sides of M.D.'s face and temples. While visiting Randy and her stepmother Carla, M.D., was put down for a nap while the other family members went outside. When M.D. awoke, Randy noticed a bruise on her face. Randy, when returning M.D. to her mother, Rebecca, asked Rebecca how M.D. got the bruise on her face. Before Rebecca could answer, M.D. responded by saying Carla had struck

her. The child abuse investigator concluded that M.D. had been abused, and that the perpetrator was Carla.

The second incident also occurred while M.D. was visiting her father and Carla. M.D. returned from the visit with two long scratches on her back. Examining M.D. on the night she returned, the treating physician determined the scratches were 24 to 72 hours old. M.D. told both the treating physician and the judge Carla scratched her while preparing her for a bath. The child abuse investigator concluded M.D. was abused, but could not ascertain the perpetrator.

The third incident occurred when Randy and Carla went to the natural mother's home to visit M.D. A shoving match ensued with M.D. caught in the middle. The record shows that, after the struggle, Carla bent over to give M.D. a kiss and bit her cheek. The various witnesses testified that bite was not present before the incident.

After the adjudicatory hearing, M.D. started seeing an art therapist. This evidence is very revealing. M.D. consistently told her therapist that Carla was the perpetrator. The therapist testified that M.D. had a fixation with bathrooms, and that M.D. told him she would hide from Carla in the bathroom. M.D. also told the therapist that Carla had taken a wet washcloth and wiped it on her underwear to make it look as if she wet her pants.

After the first incident of abuse, Randy agreed not to leave M.D. alone with Carla. However, during one visit Randy went to work and left M.D. with Carla. Later that day the scratching incident occurred.

We conclude the evidence presented clearly establishes that M.D. has been abused by Carla. Physical abuse is a proper basis to support a CINA adjudication. Also, the evidence shows that the abuse, with the exception of the third incident, occurred while M.D. was in Randy's custody. This leads us to conclude that Randy is not properly supervising M.D.'s visits or is unable to do so. For these reasons

we hold the State proved by clear and convincing evidence that a CINA adjudication was necessary.

Randy contends the court erred by restricting his visitation rights immediately after the adjudicatory hearing. The court in its subsequent dispositional order ordered that similar restrictions be placed on Randy's visitation rights. *He claims the court has no statutory authority to restrict visitation.* The State argues the court under Iowa Code section 232.101 has inherent authority to restrict visitation.

Because the court has issued a dispositional order in this matter, we conclude the issue of whether the trial court could restrict Randy's visitation rights pending disposition is moot. In regard to the visitation restrictions enumerated in the court's dispositional order, we conclude that under the Iowa Code section 232.101¹ *the juvenile court can restrict a parent's visitation.* The welfare and best interests of children are paramount in interpreting code provisions governing neglected, dependent and delinquent children. In Interest of J.R.H., 358 N.W.2d 311, 317 (Iowa 1984). The statute allowed the court, after the dispositional hearing, to prescribe any terms and conditions necessary to assure the proper care and protection of the child while in the custody of its parent. The court in this case, based on the evidence presented to it, imposed the restrictions it felt necessary to assure the proper care and protection of the child. Our review of the evidence also leads us to conclude the court's restrictions were appropriate.

¹Iowa Code § 232.101 states in pertinent part:

1. After the dispositional hearing, the court may enter an order permitting the child's parent, guardian or custodian at the time of the filing of the petition to retain custody of the child subject to terms and conditions which the court prescribes to assure the proper care and protection of the child. Such terms and conditions may include supervision of the child and the parent, guardian or custodian by the department of human services, juvenile court office or other appropriate agency which the court designates.

Randy also contends the trial court erred by failing to dismiss the CINA petition when the State, Randy, and the child's court-appointed attorney moved to dismiss the petition. The State does not challenge the denial on appeal.

On the day of the dispositional hearing, the Marion County Attorney asked for the matter to be dismissed since there was a pending modification action in Polk County regarding the custody of the children. The attorneys for the father and M.D. joined this motion. The mother resisted. The court denied the motion because of its belief that an action of this nature should not be started and then dismissed right before the matter is going to be resolved. Although for a different reason, we agree that denial of the motion was correct.

The juvenile code does not directly address the question of whether a court must dismiss a CINA petition upon the request of the State. The Iowa Rules of Civil Procedure apply to juvenile proceeding. Iowa Code § 232.152. Under rule 215 a party has an absolute right to dismiss his petition without prejudice before the trial was begun. Iowa R. Civ. P. 215. State ex rel. Iowa Dep't. of Environmental Quality v. Greenley, 336 N.W.2d 414, 416 (Iowa 1983). Once trial has begun, the party may only dismiss his action or claim with the consent of the court. Id. The questions then become whether an adjudicatory hearing in a CINA proceeding is a "trial" for Iowa Rule of Civil Procedure 176 purposes, and whether that trial had begun. We conclude the adjudicatory hearing is a trial, and that it had begun for rule 215 purposes.

For rule 215 purposes, the definition of "trial" is the definition used in rule 176. "A trial is a judicial examination of issues in an action, whether of law or fact. . . ." Iowa R. Civ. P. 176. A trial within the meaning of rule 176 is hearing on the merits of the controversy after the opportunity for preliminary

proceedings has passed. Greenley, 336 N.W.2d at 416 (quoting Orr v. Iowa Public Service Co., 277 N.W.2d 899, 901 (Iowa 1979)).

It is clear that an adjudicatory hearing is a "trial" within this definition. CINA proceedings are divided into two stages: the adjudicatory hearing and the dispositional hearing. At the adjudicatory hearing, all parties present evidence relating to the merits of the CINA petition. The court then makes a decision on the merits of the petition. See Iowa Code § 232.2 (1987). Clearly, since this is a hearing on the merits, it is a trial for rule 215 purposes.

It is also clear that the motion to dismiss was not made prior to the adjudicatory hearing. The motion was made during the court's dispositional hearing. The court, therefore, was not required to grant the motion since the State did not have an absolute right to dismissal at that point. The ruling becomes a discretionary one. We conclude, therefore, the juvenile court was not required to dismiss the case and turn to the merits of that issue.

We conclude the trial court did not err in denying the motion to dismiss. The court had already made a determination that M.D. was a child-in-need-of assistance and was in the process of taking evidence prior to giving its dispositional order. We have already concluded the evidence was sufficient to support the State's petition. A dispositional order was in M.D.'s best interests and necessary to protect M.D. from further abuse while the parties involved underwent counseling. The parties were then free under Iowa Code section 232.103 to seek relief from the dispositional order. We hold the trial court did not err in denying the motion to dismiss.

Randy next challenges the court's remedy after the dispositional hearing. He asserts the court by ordering restricted and supervised visitation did not fashion the least restrictive remedy.

Iowa Code section 232.99(3) requires the court to make the least restrictive disposition appropriate under the circumstances. The court in this case ordered Randy to undergo counseling before he could have unsupervised, uncontrolled visitations with M.D. The court also ordered that M.D. would remain in Rebecca's custody and that M.D. was not to have any contact with Carla. Custody of M.D. was not transferred and Rebecca was ordered to cooperate in visitation. The conditions were to remain in effect until the parties had completed appropriate family counseling.

Under the circumstances in this case, we find the disposition to be the least restrictive and fully appropriate. Randy's psychological evaluation revealed that he suffers from a psychotic disturbance which reduces his ability to function effectively as a parent. The court also found that Carla had abused M.D. and separation was necessary to protect M.D. We feel that because of the potential for abuse the separation of M.D. was necessary and appropriate. The supervised visitation is also appropriate since there was a danger Randy would not protect M.D. from Carla. We held the court did not err in its dispositional order.

Randy's final contention is that the court erred in ordering the parties to take and pay for the mental examinations, and ordering him to pay one-half M.D.'s attorney fees. We find the court did not err in ordering parents to pay for their exams, and in ordering Randy to pay one-half of M.D.'s attorney fees.

The court, contrary to Randy's assertion, does have the power to order the examination of the parents and stepparents. Iowa Code section 232.98(2) gives the court the authority to order the examination of the parent, guardian, or custodian if that person's ability to care for the child is at issue. Iowa Code section 232.2(11) then defines "custodian" to include stepparents. Clearly, the court had the authority to order the exams.

The court also had the authority to assess the costs of the examinations to the parties. The juvenile code does not specifically grant or deny the court any authority to assess these costs. However, the court is able to order the parents to pay a child's costs under section 232.141(2). We conclude that requiring parents to pay for their own examinations, where they have the ability to pay, is consistent with the juvenile code's assessment of costs for State services against parents who have the ability to pay. See, e.g., Iowa Code §§ 232.141(2) and 234.39 (1987). We also find that if the juvenile court has the authority to order the examinations, the court has the implied authority to order the parents to pay for them. 20 Am. Jur. 2d Courts, § 79, at 440 (1965) (courts have the power to do all things that are reasonably necessary for the administration of justice within the scope of their jurisdiction). In this case, the parents have the ability to pay for the examinations, and therefore, they would be responsible for the costs.

Randy also asserts the court could not order him to pay one-half of M.D.'s attorney fees. Iowa Code section 232.89(3) gives the court authority to assess the child's attorney fees against the parent, guardian, or custodian. We find nothing improper in that aspect of the court's order.

AFFIRMED.