IN THE COURT OF APPEALS OF IOWA

No. 3-1130 / 13-1606
Filed December 18, 2013

IN THE INTEREST OF J.S. AND N.S.,
Minor Children,

A.S., Mother,
Appellant.

Appeal from the Iowa District Court for Woodbury County, Julie Schumacher, District Associate Judge.

The mother appeals the juvenile court's adjudication that her children, J.S. and N.S., are children in need of assistance pursuant to Iowa Code section 232.2(6)(b) (2013). **AFFIRMED IN PART AND REVERSED IN PART.**

David A. Dawson, Sioux City, for appellant mother.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, Patrick Jennings, County Attorney, and Diane Murphy, Assistant County Attorney, for appellee State.

Tobias Cosgrove, Sioux City, attorney and guardian ad litem for minor children.

Considered by Vogel, P.J., and Mullins and McDonald, JJ.

McDONALD, J.

Ashley appeals from an order adjudicating her children, J.S. and N.S., in need of assistance pursuant to Iowa Code section 232(6)(a), (b), and (c)(2) (2013). For the reasons set forth below, we affirm in part and reverse in part.

I.

This family came to the attention of the Iowa Department of Human Services (DHS) in April 2013, when it was alleged that Ashley was using methamphetamine while caring for her children. In May 2013, DHS requested that Ashley undergo a drug test; she complied and tested positive for methamphetamine, amphetamine, cannabinoids, and carboxy-THC. She admitted to DHS that she had relapsed following completion of the Women's and Children's Center treatment program in September 2012. J.S. and N.S. were voluntarily placed with their maternal grandparents in South Sioux City. DHS offered voluntary services to Ashley, and Ashley entered inpatient substance abuse treatment.

Based on the positive drug test, DHS found that Ashley committed child abuse for denial of critical care. The juvenile court held an adjudication hearing in September 2013. The hearing was not reported. No witnesses were called. The State's exhibits were admitted into evidence without objection. The juvenile court adjudicated J.S. and N.S. in need of assistance pursuant to Iowa Code sections 232.2(6)(a), (b), and (c)(2). The adjudication under paragraph (a) relates only to the fathers of J.S. and N.S., and the fathers do not appeal the adjudication. Ashley consented to the adjudication pursuant to section 232.2(6)(c)(2), and she does not challenge that adjudication in this appeal. At

the time of the hearing, Ashley resisted adjudication pursuant to section 232.2(6)(b), and she challenges that ground in this appeal.

II.

Before turning to the merits of Ashley's argument, we must assure ourselves that the issue is properly presented for appellate review. As a general rule, this court will "affirm the trial court if one ground, properly urged, exists to support the decision." *In re L.G.*, 532 N.W.2d 478, 480 (Iowa Ct. App. 1995). This is true because "appellate courts confine their review to judicial action or inaction, not the reasons underlying the decision." *Id.* Notwithstanding this general rule, a party may seek appellate review of one ground for adjudicating a child in need of assistance even where conceding another ground for adjudication was proper if the challenged ground has independent legal consequences for the parent and child that must be addressed:

> The underlying grounds of adjudication in child in need of assistance cases have important legal implications beyond the adjudication. The grounds for adjudication may affect the course of the dispositional phase of the case, and may even be the basis for a subsequent proceeding for termination of a parent-child relationship. Much may be at stake. For that reason, we believe the issue is properly presented on appeal.

Id. (internal citations omitted). Here, the challenged ground has independent legal consequences because the challenged ground gives rise to separate and distinct grounds for proceeding with the termination of the parent child relationship. Thus, although Ashley consented to and does not appeal the adjudication pursuant to section 232.2(6)(c)(2), her appeal of the adjudicatory order with respect to section 232.2(6)(b) is properly before the court.

III.

Ashley contends that there is insufficient evidence to support the adjudication pursuant to section 232.2(6)(b). A party may challenge the sufficiency of the evidence supporting adjudication for the first time on appeal. *See* Iowa R. Civ. P. 1.904(2) ("But a party, on appeal, may challenge the sufficiency of the evidence to sustain any finding without having objected to it by such motion or otherwise."); *In re A.R.*, 316 N.W.2d 887, 888-89 (Iowa 1982) (holding that parent may challenge sufficiency of evidence to support termination without first having to raise the issue in the district court).

We review child-in-need-of-assistance proceedings de novo. *See In re K.N.*, 625 N.W.2d 731, 733 (Iowa 2001). We examine both the facts and law, and we adjudicate anew those issues properly preserved and presented. *See L.G.*, 532 N.W.2d at 480-81. We give weight to the findings of the juvenile court, especially concerning the credibility of witnesses, but we are not bound by them. *See In re E.H. III*, 578 N.W.2d 243, 248 (Iowa 1998). While giving weight to the findings of the juvenile court, our statutory obligation to review adjudication proceedings de novo means our review is not a rubber stamp of what has come before. We will thus uphold an adjudicatory order only if there is clear and convincing evidence supporting the statutory grounds cited by the juvenile court. *See* Iowa Code § 232.96; *see also In re C.B.*, 611 N.W.2d 489, 492 (Iowa 2000). Evidence is "clear and convincing" when there are no "serious or substantial doubts as to the correctness or conclusions of law drawn from the evidence." *C.B.*, 611 N.W.2d at 492.

As relevant here, a child in need of assistance is one whose parent, guardian, custodian, or other member of the child's household "has physically abused or neglected the child, or is imminently likely to abuse or neglect the child." Iowa Code § 232.2(6)(b). As used here, "physical[ ] abuse[ ] or neglect[ ]" and "abuse or neglect" are statutorily-defined phrases having a narrow definition—not separate words joined by a disjunctive and meant to encompass any type of harm or risk of harm to which the child might be exposed. Instead, as used here, the phrases "physical[ ] abuse[ ] or neglect[ ]" and "abuse or neglect" mean only "any nonaccidental physical injury suffered by the 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." *Id.* § 232.2(42). While the code does not define "physical injury," Iowa Department of Human Services' regulations regarding child abuse do define the term. As defined by the administrative code, "'[p]hysical injury' means damage to any bodily tissue to the extent that the tissue must undergo a healing process in order to be restored to a sound and healthy condition or damage to any bodily tissue which results in the death of the person who has sustained the damage." Iowa Admin. Code r. 441-175.21.

With respect to past "abuse or neglect," the challenged statutory provision requires the State to prove by clear and convincing evidence at least three things. First, the child must have sustained a "physical injury"—one causing damage to bodily tissue. *See In re B.B.*, 440 N.W.2d 594, 597 (Iowa 1989) (stating that section 232.2(6)(b) requires a showing of physical injury). There is no such evidence in this record. Second, the physical injury must have been the result of the acts or omissions of specified persons—a parent, a guardian, a

custodian, or other person legally responsible for the child. *See, e.g.*, *In re Driver*, 311 N.W.2d 87, 89-90 (Iowa 1981) (holding that the State failed to prove physical injury was the result of parental conduct). There is no such evidence in this record. Third, the physical injury must have been non-accidental. Again, there is no such evidence in this record. The State concedes that there are no incidents of past "physical abuse or neglect" that would support the adjudication.

The State may also seek to adjudicate a child in need of assistance pursuant to section 232.2(6)(b) if the child is "imminently likely" to suffer "physical abuse or neglect," as defined above. "Imminently likely" is not defined by the code. As used here, it means at least two things: an immediate risk of the statutorily proscribed harm; and a real, as opposed to speculative or conjectural, risk of statutorily proscribed harm. *See* Webster's Third New International Dictionary 1130 (2002) (defining "imminent" as "ready to take place; near at hand"); *see also 31 Foster Children v. Bush*, 329 F.3d 1255, 1265 (11th Cir. 2003) (defining imminent as real and immediate). The State relies solely on the DHS's child abuse assessment to establish J.S. and N.S. are imminently likely to suffer physical abuse or neglect.

The DHS assessment does contain language regarding the potential harms of methamphetamine use generally, but the assessment does not contain specific findings relating to this parent or these children sufficient to constitute clear and convincing evidence of the statutorily proscribed harm. In fact, the language in the assessment regarding the harms of methamphetamine use is taken directly, without attribution or acknowledgement that it is copied, from a published legal opinion, *State v. Petithory*, 702 N.W.2d 854, 857-58 (Iowa 2005).

The State concedes that the assessment "did not tell the juvenile court anything more than what it presumably knew, from case law, about the dangers" of methamphetamine use. Nonetheless, the State argues that the court may take judicial notice of the harms posed by methamphetamine use, including the fact that the mother's methamphetamine use means she cannot safely care for her children.

The State's position thus appears to be one or both of two things: the *Petithory* decision, a criminal proceeding not involving the statute at issue, constitutes clear and convincing evidence that parental methamphetamine use is "imminently likely" to lead to "physical abuse or neglect"; or parental methamphetamine use, without more, constitutes clear and convincing evidence of imminent "physical abuse or neglect." Either position essentially asks us to decide that all children of a specified class of parents—those who use methamphetamine—should be adjudicated in need of assistance as being imminently likely to suffer statutorily defined "physical abuse or neglect." The argument erroneously focuses solely on the classification of the parent(s) and not at all on the specific facts related to the mother and children in this case. Such a classification argument is better left to legislative action. The court's role is to decide based on the evidence presented in this case, not on the basis of classification. Pure speculation and conjecture about unspecified, possible, remote harms posed by as-of-yet unidentified persons due solely to the mother's classification as a substance abuser does not rise to the level of clear and convincing evidence that the statutorily proscribed harm—non-accidental physical injury by certain specified persons—is likely to occur in the immediate

future. *See J.B.M. v. Dep't of Children & Families*, 870 So. 2d 946, 951 (Fla. Dist. Ct. App. 2004) ("[E]vidence that the parent has a drug or alcohol problem, standing alone, is insufficient to support a finding" of imminent abuse or neglect.); *see also Millslagle v. State*, 81 S.W.3d 895, 898 (Tex. Crim. App. 2002) (holding that methamphetamine user did not create "imminent" risk of bodily injury to child).

Compare this case to *Driver*, 311 N.W.2d 87. In *Driver*, the child suffered fractures to his left humerus and left femur. *See Driver*, 311 N.W.2d at 88. The parents challenged an adjudication that the child was in need of assistance due to "physical abuse or neglect." *Id. at 88.* The State built a circumstantial case that the parents caused the injuries. *See id.* at 88-89. The court held there was not clear and convincing evidence of "abuse or neglect" because the evidence did not establish that the child was in the custody of the parents, as opposed to the babysitter, at the time the injury occurred. *See id. at 89.* The failure to prove that the injury was caused by the statutorily identified persons precluded adjudication under the statute at issue. At its most general level of abstraction, *Driver* stands for the proposition that the State must produce clear and convincing evidence proving each of the elements of the specific statutory provision on which the State seeks to adjudicate a child in need of assistance. Thus, even if the court were to take judicial notice of the generalized risks associated with methamphetamine use, that finding in and of itself does not bridge the evidentiary chasm between proving a generalized risk of harm and proving a real and immediate risk of physical injury by specified persons, which is the limited issue before us.

There is no doubt that the State has an interest in protecting the welfare of these children. *See In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981) (describing the duty of the State as *parens patriae*). There is no doubt, as a general proposition, that the State need not wait until a child suffers actual harm before taking action. *See In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006). There is no doubt that Ashley's substance use and abuse poses potential risks to the welfare of her children. *See In re J.K.*, 495 N.W.2d 108, 113 (Iowa 1993). Ashley concedes as much, agreeing that her children were properly adjudicated in need of assistance because of her drug-induced failure to "exercise a reasonable degree of care in supervising" her children. Iowa Code § 232.2(6)(c)(2). There is also no doubt that neither the State's interest in protecting these children nor Ashley's concession that these children were properly adjudicated in need of assistance on another ground, relieves the State of its burden of proving by clear and convincing evidence the additional statutory ground upon which it seeks to adjudicate these children in need of assistance. The State has not met its burden of establishing that these children should be adjudicated in need of assistance pursuant to Iowa Code section 232.2(6)(b). Accordingly, we reverse the adjudication on that ground.

AFFIRMED IN PART AND REVERSED IN PART.

Mullins, J., concurs; Vogel, P.J., dissents.

VOGEL, P.J. (dissenting)

I respectfully disagree with the majority's conclusion clear and convincing evidence does not support the adjudication under Iowa Code section 232.2(6)(b).

To adjudicate the children CINA under Iowa Code section 232.2(6)(b), the State must prove by clear and convincing evidence the mother "has physically abused or neglected the child, or is imminently likely to abuse or neglect the child." Iowa Code § 232.2(6)(b). "'Physical abuse or neglect' or 'abuse or neglect' means 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." *Id.* § 232.2(42).

At the adjudicatory hearing, all exhibits offered by the State came in without objection; the mother presented no evidence, and because the hearing was not reported, we have no record if any arguments were made. We simply have a statement in the order: "The mother resists the adjudication under grounds 232.2(6)(b) and (n)." On appeal, the mother details her claim, expanding on the statutory terms of "physically abused or neglected," "imminently likely," and citing various definitions for iterations of the terms. The district court was not presented with these arguments and had no opportunity to sort through what the mother now asserts undermines the court's findings as to subsection (6)(b). Nonetheless, on our de novo review, we may consider whether clear and convincing evidence was presented to reach the merits of her appeal. *See In re A.R.*, 316 N.W.2d 887, 889 (Iowa 1982) (holding the rules of civil procedure apply to juvenile proceedings, thereby allowing sufficiency of the evidence to "be challenged on appeal when that issue has not been raised below").

Here, Child Protective Services determined there was sufficient credible evidence to affirm the allegations of denial of critical care and failure to provide proper supervision. Specifically, in the DHS report dated June 20, 2013, the worker noted:

> Even if [the mother] was not caring for [the children] at the time of her use, risk exists in caring for a child when coming down from methamphetamines.
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> Parents who are addicted to methamphetamines are not available to their children because under the influence of meth there is an initial high that an individual perceives and very soon after that high comes a downfall or depression, which is very much more severe with methamphetamine than other drugs of abuse. When that happens many meth using adults will fall asleep, and that period can last for hours at a time. In that period of time, they're not capable of providing supervision and care for young children around the household.
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> Methamphetamine is also a drug that stimulates the sensory nerve system and it also blocks the higher centers that are responsible for the checks and balances of impulses. Perceptions of danger and reasoning ability are hindered from ongoing meth use, so that over a period of time an adult using methamphetamine loses (his/her) capacity to function on a daily basis because of a lack of comprehension of what the risks in the environment are, what the children's needs on a day-to-day basis are because they don't have the energy level to provide for those needs. And also, because of the poor impulse control and increased risk of losing their temper and anger, the children who are in an environment where parents use meth are at an increased risk of physical abuse.[1]

It is undisputed the mother recently used, and continues to use, methamphetamine, and has struggled with addiction in the past. Less than one year after finishing treatment, she relapsed while J.S. was residing with her. In May 2013, she tested positive for methamphetamine at 7890 picograms per

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[1] This is a quotation from *State v. Petithory*, 702 N.W.2d 854, 857–58 (Iowa 2005), in which an expert witness testified about the dangers the child faced in a home where both parents were habitual methamphetamine users. While a criminal case is not necessarily reflective of a CINA adjudication, it nonetheless is an accurate portrayal of the dangers children face when in the care of methamphetamine users.

milligram, which the State contends is consistent with chronic or daily use. It is evident the mother has not overcome her addiction, and the children have been removed from her care in the past due to her substance abuse issues, a fact that is instructive in the present case. *See In re L.L.*, 459 N.W.2d 489, 493–94 (Iowa 1990) (noting the parent's past conduct is instructive in determining her future actions). Furthermore, a parent using methamphetamine while caring for a child is known to be a significant danger and pose great harm to that child, particularly when suffering from an addiction. *See State v. Petithory*, 702 N.W.2d 854, 858 (Iowa 2005); *see also In re A.B.*, 815 N.W.2d 764, 776 (Iowa 2012) (recognizing drug use can "render a parent unfit to raise children").

Though the children have not yet suffered any physical harm, I agree with the State's contention it is imminently likely they would suffer physical abuse or neglect if left in the mother's care. We do not have to wait for harm to occur before our statutes allow us to take preventative action. *See In re L.L.*, 459 N.W.2d at 494 (noting Iowa statutes "do not require delay until after harm has occurred"). Given the danger a methamphetamine user poses to young children, I agree with the juvenile court the children could be adjudicated CINA under Iowa Code section 232.2(b), and would therefore affirm.