

IN THE COURT OF APPEALS OF IOWA

No. 2-156 / 11-2116
Filed February 29, 2012

**IN THE INTEREST OF D.B., L.W., and A.W.,
Minor Children,**

A.S., Mother,
Appellant.

Appeal from the Iowa District Court for Polk County, Colin J. Witt, District Associate Judge.

A mother appeals the district court's order adjudicating her three children in need of assistance. She also appeals the district court's denial of her request to return the children to her care. **AFFIRMED IN PART, DISMISSED IN PART AS MOOT.**

Jesse A. Macro of Gaudineer, Comito & George, L.L.P., West Des Moines, for appellant mother.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, John P. Sarcone, County Attorney, and Cory McClure, Assistant County Attorney, for appellee State.

Robert Wright, Jr. of Wright Law Office, Des Moines, for intervenors.

Charles S. Lavorato, Polk City, for appellee father of D.B.

Cynthia A. Lange, Des Moines, for appellee father of L.W. and A.W.

Erin Mayfield of Youth Law Center, Des Moines, attorney and guardian ad litem for minor children.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

VOGEL, P.J.

On September 1, 2011, officers from the Des Moines Police Department executed a search warrant at a residence in Des Moines.¹ Officers found thirteen grams of crack cocaine in a clear plastic bag, sitting in front of the couch in the living room, located at the front of the house. Other drug paraphernalia were also found in the house. Angela and her paramour, Jonah, as well as Angela's three children, D.B., born 2004, L.W., born 2006, and A.W., born 2007, were home at the time of the search.² While Angela claimed she and D.B. were not living at the home, she and all three children were in a room in the back of the house during the search.³ Jonah was arrested for possession of a controlled substance with intent to deliver, a tax stamp violation, and child endangerment. Angela was arrested for child endangerment. All three children were placed with Jonah's parents.

Following a removal hearing on September 13, 2011, the children were returned to Angela's care. On September 22, 2011, the guardian ad litem sought, and the district court ordered, ex parte temporary removal after Angela and the children's hair stat tests came back positive for exposure to cocaine. The children were placed with a foster family. A removal hearing was held on September 29, 2011; the district court confirmed the removal. An adjudicatory hearing was held on October 17, 2011, after which the children were adjudicated

¹ Prior to the search, officers participated in at least two undercover drug sales with Jonah, Angela's paramour and the father of L.W. and A.W.

² L.W. and A.W. are Jonah's biological children; D.B. is their half-brother.

³ During the pendency of these proceedings, Angela testified that she was not living at the house in September 2011, as she and D.B. had moved in with a friend in May 2011 due to relationship problems between Angela and Jonah. She testified L.W. and A.W. continued to live with Jonah.

in need of assistance under Iowa Code section 232.2(6)(c)(2) (2011). L.W. and A.W. were placed with their paternal grandparents; D.B. was initially placed with his paternal great-grandmother, but later placed in the same home as L.W. and A.W. A dispositional hearing was held on November 29, 2011, and on December 12, 2011, the district court ordered the children remain in out of home placement.

Angela appeals the district court's orders adjudicating the children in need of assistance and the district court's confirmation of the ex parte removal. Angela further asserts the district court erred when it did not return the children to her care after the adjudicatory and dispositional hearings. Our review of child-in-need-of-assistance proceedings is de novo. *In re K.B.*, 753 N.W.2d 14, 15 (Iowa 2008). "We review the facts as well as the law and adjudicate rights anew." *In re M.M.*, 483 N.W.2d 812, 814 (Iowa 1992).

I. Removal

We need not determine the merits of the ex parte removal order from September 22, 2011, which was confirmed by the district court on September 30, 2011, because as the children have been returned to Angela, the issue is moot and "[w]e cannot go back in time and restore custody based on alleged errors in the initial removal order." See *In re A.M.H.*, 516 N.W.2d 867, 871 (Iowa 1994) (declining to determine the validity of an ex parte removal order). Likewise, the district court's denial of Angela's request that the children be returned to her care following the adjudicatory order and the December 12, 2011 dispositional order has been resolved. On January 11, 2012, Angela filed her petition on appeal, but additional filings alerted this court that on February 6, 2012, the district court returned custody of the children to Angela. See *Lewis Investments, Inc. v. City of*

Iowa City, 703 N.W.2d 180, 183 (stating the test for mootness is “whether an opinion would be of force or effect in the underlying controversy”); *In re L.H.*, 480 N.W.2d 43, 45 (Iowa 1992) (“Matters that are technically outside the record may be submitted in order to establish or counter a claim of mootness. We consider matters that have transpired during the appeal for this limited purpose.”). Therefore, the district court’s February 6, 2012 decision to return the children to Angela renders this issue on appeal moot and we accordingly dismiss this claim.

II. Adjudication

Angela asserts the State did not meet its burden of proving by clear and convincing evidence that the children were in need of assistance. The State is required to prove the allegations of the petition by clear and convincing evidence. *In re L.G.*, 532 N.W.2d 478, 481 (Iowa Ct. App. 1995). Evidence is clear and convincing when “there [is] no serious or substantial doubt about the correctness of a particular conclusion drawn from the evidence.” *Id.*

The district court adjudicated the children in need of assistance under Iowa Code section 232.2(6)(c)(2). This code section defines a child in need of assistance as a child:

(c) Who has suffered or is imminently likely to suffer harmful effects as a result of . . .

. . . .
 (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)(c)(2). The State has a duty to ensure that “every child within its borders receives proper care and treatment.” *In re D.T.*, 435 N.W.2d 323, 329 (Iowa 1989). Moreover, the goal of our statutory scheme is to “prevent

probable harm to the child” and to “not require delay until after harm has occurred.” *In re L.L.*, 459 N.W.2d 489, 494 (Iowa 1990).

In this case, the children and Angela all tested positive for cocaine exposure after the September 13, 2011 removal hearing. While Angela denied using drugs at the various hearings throughout this case, the district court was not convinced Angela was telling the truth, commenting, “[Angela’s] knowledge was greater than she’s let on. And that, in and of itself, places the children at risk of harm and meets the requisite standards under [232.2(6)(c)(2)].” Angela argues even assuming the drug tests were accurate, the State was required to show a nexus between the positive drug test and danger or harm to the children.

Under the language of the statute, the State’s burden was to prove the children suffered or were likely to suffer harmful effects due to Angela’s failure to exercise a reasonable degree of care in supervising the children. Iowa Code § 232.2(6)(c)(2). Allowing one’s children to be exposed to drugs such that their hair stat tests come back positive for exposure to cocaine is unquestionably indicative that the children suffered harm, or were likely to suffer harm, due to Angela’s failure to exercise a reasonable degree of care in supervising the children. Although Angela argued that she had not lived in the home where the drugs were found for at least four months and that she would not test positive for drugs in her system following the September 13 hearing, Angela did in fact test positive for exposure to cocaine. What is more problematic, however, is the fact that all three children tested positive for exposure to cocaine. Angela claims “[a]ny exposure to illegal drugs was clearly the result of actions of the father, which the mother did not have knowledge of or condone,” and that the State

failed to prove otherwise. However, we defer to the district court's credibility findings, which coupled with the children's testing positive for cocaine exposure after being present in the "drug house," supports the finding that Angela did not exercise a reasonable degree of care in attending to the needs of her children. See, e.g., *In re C.B.*, 611 N.W.2d 489, 492 (Iowa 2000) (noting that although we are not bound by them, "we give weight to the trial court's findings of fact, especially when considering credibility of witnesses"). We therefore affirm the adjudication.

AFFIRMED IN PART, DISMISSED IN PART AS MOOT.