IN THE COURT OF APPEALS OF IOWA

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No. 7-514 / 97-0379
Filed 10/29/97

IN THE INTEREST OF C.C., Minor Child,

R.B., Mother,
Appellant.

000087

Appeal from the Iowa District Court for Dickinson County, Cameron B. Arnold, District Associate Judge.

Mother appeals the termination of her parental rights to her minor child. **AFFIRMED.**

Thomas M. Magee, Emmetsburg, for appellant.

Thomas J. Miller, Attorney General, and Charles K. Phillips, Assistant Attorney General, for appellee-State.

Shannon Sandy, Spirit Lake, guardian ad litem for minor child.

Considered by Cady, C.J., and Huitink and Vogel, JJ.

HUITINK, J.

A mother appeals the termination of her parental rights to her son. We affirm on appeal.

Robin and Keni are the parents of Cody, who was born on February 27, 1988. Robin and Keni were never married, and they separated before Cody was born. In 1989 Robin married Steve.

The family came to the attention of the Department of Human Services (DHS) in October 1993. Robin was experiencing mental health problems. Cody was having behavioral problems at school. DHS issued a founded report of denial of critical care against Robin because she had left Cody in the care of a drug dealer while she went shopping. This person had sexual contact with Cody.

On October 28, 1993, Robin was involuntarily committed for psychiatric treatment. Cody was placed in foster care. Robin has been variously diagnosed with an adjustment disorder, post traumatic stress disorder, dysthymic disorder, mixed personality disorder, borderline histrionic traits, schizo-affective disorder, borderline personality disorder, and attention deficit hyperactivity disorder. There were also concerns Robin had problems with substance abuse.

On December 22, 1993, the juvenile court adjudicated Cody a child in need of assistance. After the adjudication hearing, Robin privately retained new counsel, Ray Sullins. Thereafter, she refused to cooperate with services. The dispositional order

was filed on June 3, 1994. The court placed Cody in the care of Keni, under the supervision of DHS. The court determined in the event Robin wished to pursue reunification with Cody, she could apply to the court for services.

In May 1995, Robin requested a change in counsel and expressed an interest in services. Her present counsel was then appointed. Robin and Steve completed a psychosocial evaluation, which showed they had a definite need for parenting skills. Robin started family-centered and individual services in July 1995.

The State filed a petition for termination of Robin's parental rights on August 18, 1995. In September 1995, police officers executed a search warrant at Robin's residence which revealed drug paraphernalia. Robin had a substance abuse evaluation and received a diagnosis of chemical dependency, inactive.

A termination hearing was held in January 1996. During the proceedings, Keni decided he no longer wanted custody of Cody. The parties then stipulated to a continuance. Cody was placed back in the same foster home where he had lived from October 1993 until June 1994.

DHS asked Dr. Randell Alexander, a professor of pediatrics at the University of Iowa, and Beverly Saboe, a clinical nurse specialist, to review the documents in the case. Dr. Alexander and Saboe concluded Cody would be at imminent risk of denial of critical care if returned to Robin. They found there had been medical neglect, poor parenting supervision, and profound failure to meet Cody's emotional needs.

The State also requested Robin and Steve to submit to a hair sample drug test. The juvenile court ordered them to participate in this drug testing. The test revealed traces of methamphetamine in the hair of Robin and Steve.

Cody progressed well in foster care. He has been diagnosed with attention deficit hyperactivity disorder. Cody was exposed to alcohol and illegal substances before he was born. He has had some behavioral problems, particularly following visitation with Robin. DHS considers Cody to be adoptable.

On January 31, 1997, the juvenile court terminated Robin's parental rights to Cody pursuant to Iowa Code sections 232.116(1)(c), (e), (h), (j), and (k). The court found Cody could not be returned to Robin's care, and he was in need of stable, long-term parenting. In the order, the court noted it had been contacted by Cody, who stated he wanted to be adopted. Robin has appealed the order terminating her parental rights.

I. The scope of review in termination cases is de novo. *In re S.N.*, 500 N.W.2d 32, 34 (Iowa 1994). The grounds for termination must be proven by clear and convincing evidence. *In re R.K.K.*, 544 N.W.2d 274, 277 (Iowa App. 1995). Our primary concern is the best interests of the child. *In re A.B.*, 554 N.W.2d 291, 293 (Iowa App. 1996).

II. Robin contends there is insufficient evidence to terminate her parental rights under section 232.116(1)(e). In particular, she asserts the State failed to show

clear and convincing evidence Cody could not be returned to her care, which is a requirement of section 232.116(1)(e)(4).

We find there is clear and convincing evidence Cody cannot be returned to Robin's care. Robin has not dealt with her substance abuse problems. She has continuing mental health problems. She has not recognized how her failure to select an adequate caretaker for Cody led to him being placed in a position where he was sexually abused. Robin continues to deny she has problems and focuses her efforts on blaming others. She has made many accusations against her social worker, Cindy Iedema; Keni, and the foster family. We find Robin's parental rights were properly terminated under section 232.116(1)(e).

III. Robin claims there is insufficient evidence to terminate her parental rights under sections 232.116(1)(c), (h), (j), and (k). When the juvenile court terminates parental rights under more than one statutory ground, we need only find grounds to terminate under one of the sections cited by the juvenile court to affirm. *In re A.J.*, 553 N.W.2d 909, 911 (Iowa App. 1996). We have already found Robin's parental rights were properly terminated under section 232.116(1)(e). Therefore, we need not address her claims under these other code sections.

IV. Robin believes the juvenile court should not have admitted the report of Dr. Alexander and Saboe. She states her counsel received this seventy-four page

report the day before Dr. Alexander testified and he was not able to adequately cross-examine him about the report.

We determine the report of Dr. Alexander and Saboe was admissible. Most of the report contained information which was already in the record. The recommendations of Dr. Alexander and Saboe cover only slightly over four pages.

Robin also believes the opinion of her psychiatrist, Dr. M. Christine Massie should have been given more weight. In our de novo review, we determine the relative weight to be given each opinion. We note Dr. Massie was primary involved with regulating Robin's medication, and had never seen her interact with Cody.

V. Robin contends the juvenile court order compelling hair analysis testing was unconstitutional under the fourth amendment right against unreasonable searches and seizure. We note termination proceedings are civil, not criminal in nature. *In re D.J.R.*, 454 N.W.2d 838, 845 (Iowa 1990). We find the Fourth amendment does not apply to this case.

Robin also relies on *Burgel v. Burgel,* 141 A.D.2d 215, 218, 533 N.Y.S.2d 735, 737 (1988), which stated that although current drug usage is relevant to a determination of an ability to parent, allowing the State unfettered discovery by hair analysis based upon mere "suspicion" of drug usage can lead to harassment and prejudice unless evidence exists that the parent is concealing the truth of drug usage.

Robin denies using illegal substances, and claims there is no evidence of current drug use.

We find there is plenty of evidence in the record to show Robin had a substance abuse problem. There was evidence Robin used cocaine, LSD, and alcohol while she was pregnant with Cody. While the case was pending, juveniles who visited her home reported smelling marijuana. The search by police officers of Robin's home revealed drug paraphernalia. A former friend testified she used methamphetamine and marijuana with Robin and Steve during 1995. We conclude the State had more than a mere "suspicion" Robin was using illegal substances. We find no abuse of discretion in the juvenile court's decision to order Robin to submit to hair analysis testing.

Robin furthermore claims the hair analysis results should not be admissible because the test is not sufficiently reliable. She asserts a positive result may occur due to exposure, as well as ingestion. In Iowa, scientific evidence may be admitted when it has been established as reliable and meets the general test for admission of expert testimony. *State v. Brown,* 470 N.W.2d 30, 32 (Iowa 1991). The trial court has broad discretion in ruling on the admissibility of expert testimony. *Id.*

In the present case, an expert from the company which analyzed the test testified to its reliability. Other courts have found hair analysis testing to be admissible. *See United States v. Medina,* 749 F.Supp. 59, 61 (E.D.N.Y. 1990); *Bass*

v. Florida Dept. Of Law Enforcement, 627 So.2d 1321, 1322 (Florida Dist. Ct. App. 1993); *Nevada Employment Security Dept. v. Holmes,* 914 P.2d 611, 614-615 (Nev. 1996). *But see United States v. Foote,* 898 F.2d 659, 665 (8th Cir. 1990). We find no abuse of discretion in the juvenile court decision to admit the results of the hair analysis testing.

VI. Robin claims she was denied effective assistance of counsel while she was represented by Ray Sullins. She asserts Sullins improperly advised her not to cooperate with DHS. Robin did not seek any services during the time period she was represented by Sullins, from February 1994 to May 1995.

Due process requires counsel appointed under a statutory directive to provide effective assistance. *In re D.W.,* 385 N.W.2d 570, 579 (Iowa 1986); *In re D.P.,* 465 N.W.2d 313, 316 (Iowa App. 1990). A parent must show: (1) counsel's performance was deficient; and (2) actual prejudice resulted. *In re A.R.S.,* 480 N.W.2d 888, 891 (Iowa 1992).

Here, Sullins was privately retained by Robin, and was not court-appointed. In addition, the evidence shows Robin refused to cooperate with services before she retained the services of Sullins. In fact, Robin chose Sullins because she wanted to fight DHS and felt her previous counsel was not aggressive enough. We find Robin was not prejudiced by the actions of her counsel.

VII. Robin contends the State did not meet its burden to show reasonable efforts were made to reunite the family. She believes DHS should have accommodated her request for another social worker. Robin felt her social worker, Cindy Iedema, was prejudiced against her.

Reasonable efforts must be provided to attempt to reunite a family before the State can terminate parental rights. *In re L.M.W.*, 518 N.W.2d 804, 807 (Iowa App. 1994). We determine Robin received reasonable services. We do not find Iedema was improperly biased against Robin.

VIII. Robin asserts she was denied due process of law when the juvenile court judge had an ex-parte communication with Cody after the close of the termination hearing. In the termination order, the juvenile court judge revealed he had been contacted by Cody, who stated he wanted to be adopted.

In our de novo review, we do not consider Cody's statement to the judge. In any event, we find this ex-parte communication was not outcome determinative. Cody made similar statements to various professionals who testified at the termination hearing.

IX. Finally, Robin contends termination of her parental rights is not in Cody's best interests. She asks to continue having visitation with Cody.

Cody needs stability and responsible parenting. His behavioral problems have improved after he was removed from Robin's home. However, he experiences

difficulties after visitation with Robin. We conclude termination of Robin's parental rights is in Cody's long-term best interests.

We affirm the decision of the juvenile court terminating Robin's parental rights to Cody.

AFFIRMED.