IN THE COURT OF APPEALS OF IOWA

No. 1-311 / 00-1336
Filed May 23, 2001

FILED
MAY 23 2001
CLERK SUPREME COURT

IN THE INTEREST OF T.L., J.L., and S.L., Minor Children,

T.L., Father,
Appellant.

Appeal from the Iowa District Court for Fayette County, Alan D. Allbee, Associate Juvenile Judge.

The father of three minor children appeals a juvenile court order terminating his parental rights. **AFFIRMED.**

Larry F. Woods, Oelwein, for appellant.

Thomas J. Miller, Attorney General, Charles K. Phillips, Assistant Attorney General, and Jay D. Villont, Assistant County Attorney, for appellee State.

Barry S. Mueller of Mueller Law Office, Postville, guardian ad litem for minor children.

Donna Lesyshen, Waterloo, for mother.

Considered by Habhab, R. Peterson, and C. Peterson, S.J.*

*Senior judges assigned by order pursuant to Iowa Code section 602.9206 (2001).

HABHAB, S.J.

Terry and Patricia L. are the parents of three minor children, Tracy, born January 1, 1987, Joseph, born November 17, 1987, and Sandy, born August 8, 1989. The children first came to the attention of the Department of Human Services (DHS) in 1996 after Patricia was temporarily incarcerated for a drug-related offense and Terry was accused of physical abuse. Patricia has had little contact with the children since her incarceration. The children were temporarily removed from their home and placed in foster care after being adjudicated in need of assistance. Both parents were ordered to obtain substance abuse treatment but neither was successful.

Although the children were returned to Terry's care in 1997, by January 1999, the children were again removed from the family home and adjudicated to be in need of assistance due to their increasingly uncontrolled and aggressive behavior, Terry's physical abuse, and his continued drug use. Despite intensive efforts, Terry refused to admit either his mental health or substance abuse problems and declined further treatment. By February 2000, both parents were incarcerated for drug-related offenses. The State filed a petition to terminate the rights of both parents, and following trial, the juvenile court entered an order terminating their rights. Both Terry and Patricia appealed. However, pursuant to a supreme court clerk's order filed January 11, 2001, Patricia's appeal was dismissed under Iowa Rule of Appellate Procedure 19(a) for failure to prosecute.

Terry asserts the district court erred in admitting the testimony of Debra Warth regarding the adoptability of the children because such testimony does not

come within the hearsay exception of Iowa Code section 232.96(6) (1999). Terry further argues that it is not in the children's best interest that they be split up for adoption, since adoption is not certain. He asks this court to "reverse the juvenile court's ruling and direct the children be placed in long-term foster care." We affirm.

I. About four months prior to the commencement of these proceedings, Terry pled guilty to a Class B felony. He was sentenced to serve an indeterminate term of imprisonment not to exceed twenty-five years. He faces a minimum of five years in prison. Termination occurred pursuant to section 232.116(1)(i). That section provides for termination where:

> (1) The child has been adjudicated a child in need of assistance pursuant to section 232.96 and custody has been transferred from the child's parents for placement pursuant to section 232.102.
>
> (2) The parent has been imprisoned for a crime against the child, the child's sibling, or another child in the household, *or the parent has been imprisoned and it is unlikely that the parent will be released from prison for a period of five or more years.* (Emphasis added.)

Termination also occurred pursuant to Iowa Code section 232.116(1)(g) (1999). Subsection "g" provides for termination where the court finds that:

> (1) The child is three years of age or younger.
>
> (2) The child has been adjudicated a child in need of assistance pursuant to section 232.96.
>
> (3) The child has been removed from the physical custody of the child's parents for at least six months of the last twelve months and any trial period at home has been less than thirty days.

(4) There is clear and convincing evidence that the child cannot be returned to the custody of the child's parents as provided in section 232.102 at the present time.

II. The appellant first asserts the juvenile court erred in allowing hearsay evidence of the social worker regarding whether the children were adoptable. The following question was asked by the assistant county attorney to the social worker:

> Q. Have they [the children's foster parents] given any indication as to their willingness to adopt these children if there were to be a termination? A. They have.
> Q. What has that indication been:
> MR. WOODS: I would object.
> MR. BUFFINGTON: I would object as well.
> MR. WOODS: Hearsay, your honor.
> THE COURT: Do you plan to call them?
> MR. VILLONT: No.
> THE COURT: Go ahead.

The evidentiary rules pertaining to CINA cases apply to termination cases. *In re E.J.R.*, 400 N.W.2d 531 (Iowa 1987). Hearsay is admissible in CINA cases under section 232.96(6). That subsection provides:

> A report, study, record or other writing or audiotape or videotape recording made by the department of human services, a juvenile court officer, a peace officer, or a hospital relating to a child in a proceeding under this division is admissible, notwithstanding any objection to hearsay statements contained in it provided it is relevant and material, and provided its probative value substantially outweighs the danger of unfair prejudice to the child's parent, guardian or custodian. The circumstances of the making of the report, study, record or other writing or audiotape or videotape recording, including the maker's lack of personal knowledge may be proved to affect the weight.

The appellant argues that the oral testimony of the social worker that the foster parents of the children indicated a willingness to adopt the children is inadmissible under section 232.96(6) for such testimony is not a report, study,

record or other writing or audiotape or videotape recording within the meaning of that statute. The appellant urges that under our de novo review that the objectionable evidence not be considered.

We have said that evidence which under ordinary rules of evidence applicable to civil trial would be excluded as hearsay, lacking a proper foundation, improper opinion evidence, or not the best evidence, is admissible in [termination] proceedings, and the nature of the evidence is to be considered as it affects its probative value rather than its admissibility. *In re H.R.K.*, 433 N.W.2d 46 (Iowa Ct. App. 1988). We find that if properly received as evidence, the hearsay statement here is relevant and its probative value substantially outweighs the danger of unfair prejudice.

But assuming without deciding that the hearsay testimony should not be considered, we find no reversible error. *In re Adkins*, 298 N.W.2d 273, 278 (Iowa 1980). Our review is de novo, and we arrive at the same result as did the juvenile court, without resort to the objectionable testimony.[1] The parental rights of the father should be terminated.

As we stated in *In re T.C.*, 522 N.W.2d 106 (Iowa Ct. App. 1994):

> This provision [section 232.116(1)(e)] does not, nor does any termination provision, require the State or the juvenile court to make a finding that the child is adoptable in order to terminate parental rights. Our governing consideration is the best interests of the child. We are not prepared to say that it is within the best interests of the child to refuse to terminate parental rights merely

---

[1] The substance of the testimony complained of, at least with regard to two of the children, is also contained in a DHS permanency staffing report that was admitted into evidence.

> because DHS has not made a showing that adoption arrangements have been made. We will not refuse to terminate the rights of parents who would otherwise be terminated because an adoptive home has not been secured.

III. The appellant next contends that the juvenile court erred in determining that the children's best interests were served by terminating parental rights. Appellate review of termination proceedings is de novo. *In re W.G.*, 349 N.W.2d 487, 491 (Iowa 1984). We give weight to the findings of fact of the juvenile court especially when considering the credibility of witnesses, but are not bound by its determination. *Id.* at 491-92.

The appellant argues that instead of terminating parental rights the juvenile court should put these children in long-term foster care. But we are faced with testimony from the family's therapist that these children need permanency and need it now, or "yesterday" in the case of the youngest.

The record before us reveals that the children have already been through a minimum of six foster homes during their eighteen months of placement. These children should not be forced to endlessly suffer the parentless limbo of foster care. *In re D.J.R.*, 454 N.W.2d 838. 845 (Iowa 1990). Nor need they endlessly await the maturity of their natural parents. *In re T.D.C.*, 336 N.W.2d 738, 744 (Iowa 1983). There is strong evidence that the children need a stable, forever home. "The crucial days of childhood cannot be suspended while parents experiment with ways to face up to their own problems." *In re A.C.*, 415 N.W.2d 609, 613 (Iowa 1987). To continue to keep children in temporary foster homes is not in their best interest. *In re J.L.P.*, 449 N.W.2d 349, 353 (Iowa 1989). In addition, long-term foster care is not preferred to termination of

parental rights. *In re R.L.*, 514 N.W.2d 900, 903 (Iowa Ct. App. 1995). We agree with the juvenile court's findings that the "insecurity and uncertainty which comes from the parentless 'limbo' of foster care is not good for these children and some permanency is necessary."

Here, we are confronted with the regrettable circumstances that the mother's parental rights have been terminated, and she is presently serving a prison term. The children's father has not cared for these children since March of 1999. He, too, is in prison and, although his plea of guilty to the felony charge is on appeal, he is presently facing a minimum of imprisonment for five years.

There is not much question that these children have been abused. To illustrate the type of abuse these children have been subjected to we adopt as our own the following findings of the juvenile court:

> On October 31, 1996, the Fayette County Juvenile Court entered an ex parte temporary removal order placing all three of the children in family foster care. The child Tracy had received a black eye as a result of her father striking the heads of Tracy and her sister Sandy together in anger over the children not having cleaned up their rooms. Tracy fearing her father's anger, made up a story that she had been injured on the playground at school. All three children reported both physical and emotional abuse at the hands of their father but were fearful of telling anyone, having been threatened with a razor strap. A child in need of assistance petition was filed and a temporary removal hearing held on November 5, 1996, after which the court continued the children in family foster care. The children's father had refused to accept his responsibility for the children's removal, was blaming others including the children, and refused to accept his potential for abuse. He had an extremely angry reaction to the children during a supervised visit and discussed adult issues in front of the children despite redirection from counselors. The children continued to express outward fear of their father. A child abuse report dated November 27, 1996, Incident #9630641, [Petitioner's Bulk Exhibit #1 – Document #4] was founded against the children's father for the physical abuse of Tracy and emotional injury of all three

> children. The report notes that all three children were having serious emotional difficulties, including enuresis, as a result of their exposure to threats and physical violence toward themselves and their mother. By order entered December 13, 1996, in Case #1547, the children were adjudicated to be children in need of assistance as defined in Iowa Code Section 232.2(6)(b) as a result of the physical abuse suffered by Tracy and the imminent risk that harm to the other two children.

We affirm the juvenile court in all respects. From our de novo review of the record, we conclude the facts are sufficient to establish the grounds for termination of the parental rights of the biological father as to the children in interest and have been established by clear and convincing evidence. The termination of his parental rights is in the best interest of the children. We are reminded that whenever possible siblings should be kept together and should not be separated without good and compelling reasons. *In re A.M.S.*, 419 N.W.2d 723, 734 (Iowa 1988).

AFFIRMED.