

FILED

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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

IN THE INTEREST OF MICHELLE L. DEAN,)
A CHILD,)

TRUDY L. DEAN, natural Mother,)

Appellant.)

750
3-62032

Appeal from Henry Juvenile Court - Harlan W. Bainter, Judge.

Appeal by mother from decree terminating her parental rights with her daughter alleging the statutory grounds were not established by clear and convincing proof. - Affirmed.

Cynthia H. Danielson, Mt. Pleasant, for Appellant.

Richard C. Turner, Attorney General of Iowa, and Stephen Robinson, Assistant Attorney General, for Appellee.

Submitted to Oxberger, C. J., and Shell and Carter, JJ. Danielson, J., takes no part.

PER CURIAM

This is an appeal by Trudy Dean from a trial court decree terminating her relationship with her daughter Michelle Dean. Action was commenced under chapter 600A, The Code, by petitioner Floyd Dean, Michelle's maternal grandfather and the father of Trudy Dean. On appeal, Trudy alleges the petitioner has failed to establish the consequential harm to Michelle of allowing the parent-child relationship to continue is more severe than the consequences of termination, thus justifying a reversal.

The petition alleged that Trudy had "substantially, continuously and repeatedly refused and neglected to comply with the duties imposed upon [her] by the parent-child relationship", that she was "palpably unfit to be party to the parent-child relationship because of a consistent pattern of specific conduct which has been and will continue to be permanently detrimental to the physical and mental health of the child" and that previously Michelle had been found by order of the court to be a child in need of assistance under chapter 232, The Code, and reasonable efforts under the direction of the juvenile court have failed to correct the conditions giving rise to the adjudication. See § 600A.8(4), (5), (6), The Code. The petition also asked that the parental rights of the natural father, Jerri Allen, be terminated on the ground of abandonment. Section 600A.8(3), The Code. Only Trudy has appealed.

Our review is de novo. In *Interest of Kelley*, 262 N.W.2d 781, 782 (Iowa 1978). In order to justify termination, the trial court and this court on review must base their findings on clear and convincing proof. Section 600A.8, The Code; *Kelley*, supra at 784.

The trial court found that the evidence indicated Trudy "has substantially, continuously and repeatedly refused and neglected to comply with the duties imposed upon her by the parent-child relationship because of an inconsistent pattern of specific conduct which has been and will continue to be permanently detrimental to the physical and mental health of the child." Sections 600A.8(3), (4), The Code. It also found that Trudy has failed to make reasonable efforts to correct these conditions during the period from January, 1977, the date the petition alleging

Michelle was a child in need of assistance was filed, and the date of the termination hearing, even though she had been given an opportunity to do so. Section 600A.8(6), The Code.

In essence, Trudy argues that the petitioner has failed to establish by clear and convincing proof that the consequential harm to Michelle is greater by allowing the parent-child relationship to continue than by its termination. Initially we note that one of the grounds of the termination proceeding was that Trudy has failed to cure, after reasonable efforts under the direction of the juvenile court, the conditions which led to the adjudication of the child being in need of assistance. At that time, the trial court ordered Trudy to seek psychiatric and psychological counseling for her emotional disability.

While the evidence before the terminating court indicates Trudy's efforts to seek counseling were marginal at best, we nevertheless find the trial court's order was not specific enough to alert Trudy to the conditions she must meet or suffer loss of Michelle under § 600A.8(6). Because of the lack of specificity, that section is unconstitutionally vague as applied to Trudy. See In Interest of Crooks, 262 N.W.2d 786, 788 (Iowa 1978). Cf. Kelley, supra at 786; In Interest of Lewis, 257 N.W.2d 505, 511-12 (Iowa 1977); Long v. Long, 255 N.W.2d 140, 145 (Iowa 1977); In Interest of Hochmuth, 251 N.W.2d 484, 489-90 (Iowa 1977).

However, the trial court found that Trudy has substantially, continuously and repeatedly refused and neglected to comply with the duties imposed upon her by the parent-child relationship. Section 600A.8(4), The Code. Our de novo review leads us to the same conclusion. The evidence is clear and convincing that Trudy has consistently placed her own self-interests above those of her daughter. As a result, her conduct has been detrimental to the physical and mental health of Michelle. A review of the evidence supporting such a conclusion is unnecessary and serves no useful purpose. It will suffice to say that Michelle, age five at the time of the hearing and now age six, has enjoyed few if any of the benefits arising out of the parent-child relationship on the part of Trudy. Paraphrasing what the court said in In Interest of Kelley, someday, perhaps, Trudy may mature into a well-adjusted stable person who will be a good parent. But Michelle is already six, and

her needs must be met now. She cannot wait for her mother to grow up. 262 N.W.2d at 786.

The second issue raised by Trudy on appeal is the dual relationship of Thomas Vilsack, the court-appointed counsel for Michelle in both actions and his representation of Floyd Dean, the petitioner in the termination proceeding. Trudy contends there is a conflict of interest and that Mr. Vilsack cannot adequately represent Michelle and at the same time effectively pursue the interests of Mr. Dean as the petitioner in the termination proceeding. Her contention is that the interests of Michelle must necessarily become subordinate and thus deprives Michelle of a fair, impartial and neutral counsel.

While we disapprove of such joint representation, we do not think the instant case requires a reversal on this ground. As the court stated in *In re Henderson*, 199 N.W.2d 111, 115 (Iowa 1972), the attorney for the child should stand alone, aloof from both the State, in this case the petitioner, and the parents. When in the attorney's professional judgment the best interests of the child coincide with those of another party, he should present those interests accordingly but independently. However, in the instant case the trial court found no conflict because Floyd Dean expressed no interest in adopting Michelle. The record discloses no contrary conflict and therefore we agree no prejudice resulted.

The termination of Trudy Dean's parental rights with respect to her daughter, Michelle, is affirmed.

AFFIRMED.

Oxberger, C. J., concurs specially.

OXBERGER, C. J. (specially concurring)

This appeal raises the issue of whether the petitioner met his burden of showing that the consequences, in harm to Michelle, of allowing the parent child relationship to continue are more severe than the consequences of termination. The majority opinion does not deal with this issue. In my judgment, the record fails to show what alternatives the State has to offer which would improve Michelle's life. We are asked to assume that because Trudy has "neglected to comply with the duties imposed upon her by the parent child relationship" any action the State may take with regard to the child will be preferable. Or perhaps it is the majority's consensus that what happens to the child following a termination of parental rights is not material to the question of whether those rights ought to be terminated in the first instance. In my opinion, *Alsager v. District Court*, 406 F. Supp. 10 (S. D. Iowa 1975), aff'd, 545 F. 2d 1137 (8th Cir. 1976), holds otherwise. In Alsager the court stated, "Termination is a drastic, final step which, when improvidently employed, can be fraught with danger. Accordingly, to preserve the best interests of both parents and children, the court deems that termination must only occur where more harm is likely to befall the child by staying with his parents than by being permanently separated from them." It is impossible to determine this question in the absence of evidence showing ⁸how the termination decision will affect the child. I would remand the case to trial court and grant the State an opportunity to present evidence on this issue.