IN THE COURT OF APPEALS OF IOWA

No. 6-362 / 96-0356

FILED
JUN 27 1996
CLERK SUPREME COURT

IN THE INTEREST OF
T.K. and W.K.,
Minor Children,

R.K., Mother,
Appellant.

Appeal from the Iowa District Court for Black Hawk County, Stephen C. Clarke, Associate Juvenile Judge.

Mother appeals the juvenile court's order terminating her parental rights over her two minor children. **AFFIRMED.**

Bradley J. Armstrong, Cedar Falls, for appellant.

Thomas J. Miller, Attorney General, Diane Stahle, Special Assistant Attorney General, Maureen McGuire, Assistant Attorney General, and Dan Block, Assistant County Attorney, for appellee-State.

Theodore R. Stone, Cedar Falls, guardian ad litem for minor children.

Heard by Sackett, C.J., and Huitink and Vogel, JJ.

VOGEL, J.

Ruby is the mother of W.K., born December 13, 1985, and T.K., born August 11, 1990. The children have been living with and cared for by the children's uncle and his girlfriend, Cassandra, off and on since 1991.

In October 1994, the juvenile court adjudicated T.K. and W.K. to be children in need of assistance. The children were placed in the custody of the Department of Human Services (DHS) and remained in Cassandra's care. Cassandra, by December of 1994, had obtained a foster care license.

In September 1995, the State filed a petition for termination of Ruby's and the children's putative fathers' parental rights. The State alleged grounds for termination of Ruby's rights existed pursuant to Iowa Code sections 232.116(1)(b), (d), (e), and (k) (1995). In summary, the State alleged Ruby had been incarcerated off and on for several years in several states, was currently incarcerated with an expected release date of March 1996, faced additional criminal charges upon her release, had a chronic substance abuse problem, and had no residence or income of her own. The State further alleged Ruby's contact with the children since September 1991 was sporadic.

Following the termination hearing in November 1995, the court found Ruby's excuses for failing to maintain significant and meaningful contact with her children were not "particularly credible." It noted Cassandra is a "competent and caring individual," was willing to adopt the children in the event of termination, and that DHS recommended the children be adopted by Cassandra. The court terminated

Ruby's parental rights pursuant to Iowa Code sections 232.116(1)(b), (d), (e), and (k) (1995). The court also terminated the fathers' parental rights pursuant to Iowa Code sections 232.2(6)(b), (d), and (e) (1995).

Ruby appeals.

I. ***Scope of Review.*** Appellate review of termination proceedings is de novo. *In re W.G.*, 349 N.W.2d 487, 491 (Iowa 1984) *cert. denied sub nom. J.G. v. Tauke*, 469 U.S. 1222 (1985). We give weight to the findings of fact of the juvenile court, especially when considering the credibility of witnesses, but we are not bound by those determinations. *Id.* at 491-92.

II. ***Statutory Criteria.*** Ruby's parental rights were terminated on four separate grounds. Ruby challenges all of these grounds on appeal. While all of these grounds are appealed, we only need to find grounds to terminate parental rights under one of the sections cited by the district court in order to affirm the district court's ruling. *In re R.R.K.*, 544 N.W.2d 274, 276 (Iowa App. 1995).

Ruby contends the district court erred in terminating her parental rights pursuant to Iowa Code section 232.116(1)(b) (1995). Section 232.116(1)(b) permits the district court to terminate the parent-child relationship if the court finds "there is clear and convincing evidence that the child has been abandoned or deserted." Abandonment occurs when there is "a giving up of parental rights and responsibilities accompanied by an intent to forego them." *In re D.M.*, 516 N.W.2d 888, 891 (Iowa

1994) (quoting *In re Burney*, 259 N.W.2d 322, 324 (Iowa 1977)). Both of these elements must be met in order for there to be abandonment.

"[P]arental responsibilities include more than subjectively maintaining an interest in a child. The concept requires affirmative parenting to the extent it is practical and feasible in the circumstances." *In re Goettsche*, 311 N.W.2d 104, 106 (Iowa 1981). Incarceration alone is not sufficient to support a termination of parental rights. *In re M.M.S.*, 502 N.W.2d 4, 8 (Iowa 1993). However, imprisonment cannot be used as a justification for a lack of a relationship with a child. *Id.* "This is especially true when the incarceration results from a lifestyle that is chosen in preference to, and at the expense of, a relationship with a child." *Id.*

Ruby argues there was insufficient evidence of her intent to abandon the children. When examining whether the intent element of abandonment has been met, the parent's behavior should be examined. *See In re D.M.*, 516 N.W.2d at 892. In *In re D.M.*, the supreme court, in determining whether a mother abandoned her children, looked at the mother's failure to contact the children and the mother's failure to contact the DHS. *Id.* The supreme court was unable to find a reasonable excuse for the mother's failure to communicate. *Id.* Consequently, it found the mother intended to abandon the children. *Id.*

In the case before us, Ruby was required by the case permanency plan to maintain monthly contact with the children. Ruby has not seen the children in person since February 1993. Yet, Ruby only wrote to the children six times over a period

of two years prior to her parental rights being terminated. At one point, Cassandra even sent Ruby a book of stamps in an attempt to encourage Ruby to write the children. Ruby, however, only sent one or two letters after receiving the stamps.

In addition, Ruby failed to contact the children through telephone calls. This was due, in part, to the fact Cassandra had her long distance telephone blocked due to her previous difficulties in paying her bills. Ruby did call her brother one time to arrange a telephone call with Cassandra. When Ruby talked to Cassandra, she did not talk to the children but instead indicated she was calling regarding an upcoming court hearing. This instance demonstrates Ruby could arrange for telephone calls with the children if she had so desired.

In the end, we find Ruby's attempts to maintain contact with the children were not remotely sufficient, particularly in light of the goal stated in the case permanency plan for Ruby to maintain, at a minimum, monthly contact. As a result, we conclude there was an intent to abandon the children demonstrated by Ruby's failure to maintain contact with the children. As Ruby does not challenge the district court's finding of the first element of abandonment, we find the district court did not err in finding Ruby's parental rights should be terminated pursuant to section 232.116(1)(b).

Ruby challenges the district court's ruling terminating her parental rights pursuant to Iowa Code section 232.116(1)(d) (1995). Section 232.116(1)(d) permits the district court to terminate the parent-child relationship if the court finds all of the following have occurred:

> (1) The child has been adjudicated a child in need of assistance pursuant to section 232.96.
>
> (2) The custody of the child has been transferred from the child's parents for placement pursuant to section 232.102 and the placement has lasted for a period of at least six consecutive months.
>
> (3) There is clear and convincing evidence that the parents have not maintained significant and meaningful contact with the child during the previous six consecutive months and have made no reasonable efforts to resume care of the child despite being given the opportunity to do so. For the purposes of this subparagraph, "*significant and meaningful contact*" includes but is not limited to the affirmative assumption by the parents of the duties encompassed by the role of being a parent. This affirmative duty, in addition to financial obligations, requires continued interest in the child, a genuine effort to complete the responsibilities prescribed in the case permanency plan, a genuine effort to maintain communication with the child, and requires that the parents establish and maintain a place of importance in the child's life.

Ruby only challenges the third element of this section.

We find Ruby failed to maintain significant and meaningful contact with the children for the same reasons stated in our finding regarding Ruby's demonstrated intent to abandon the children. The sole remaining question is whether Ruby failed to make a reasonable effort to resume care of the children despite being given the opportunity to do so. Ruby contends the only reasonable effort she could make to resume care of the children was to successfully discharge her prison term. We disagree.

We acknowledge Ruby's ability to make reasonable efforts to resume caring for the children was somewhat limited due to her incarceration. While Ruby could

not actually resume caring for the children, she could make reasonable efforts in preparation of resuming care for the children. Reasonable efforts in this regard might include maintaining meaningful and significant contact to preserve her relationship with the children and participating in services suggested by the permanency plan. As was previously stated, Ruby's efforts to maintain contact with the children during her incarceration was minimal and cannot be considered significant and meaningful. In addition, Ruby made no efforts to participate in services during a period of time in which she was not incarcerated, despite being suggested to do so. Further, there is no evidence Ruby has participated in any parenting services, drug treatment, or educational programs during her incarceration. We conclude the district court did not err in terminating Ruby's parental rights pursuant to section 232.116(1)(d).

Ruby argues the district court erred in terminating her parental rights pursuant to Iowa Code section 232.116(1)(e) (1995). Section 232.116(1)(e) permits the district court to terminate the parent-child relationship if the court finds all of the following have occurred:

> (1) The child is four years of age or older.
> (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 twelve of the last eighteen months, or for the last twelve consecutive months and any trial period at home has been less than thirty days.
> (4) There is clear and convincing evidence that at the present time the child cannot be returned to the custody of the child's parents as provided in section 232.102.

Ruby argues she should be allowed a period of time after she is released from her incarceration to demonstrate she can care for the children.

The legislature has statutorily determined the interval for which patience with parents may last. "This period must be reasonably limited because patience on behalf of the parent can quickly translate into intolerable hardship for the children." *In re R.J.*, 436 N.W.2d 630, 636 (Iowa 1989). A child 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). He or she need not endlessly await the maturity of his or her natural parent. *In re T.D.C.*, 336 N.W.2d 738, 744 (Iowa 1983). "Children simply cannot wait for responsible parenting. Parenting cannot be turned off and on like a spigot. It must be constant, responsible, and reliable." *In re L.L.*, 459 N.W.2d 489,495 (Iowa 1990).

At the time of the termination hearing, the children were five and ten years of age and had not been in Ruby's care for almost three years. Some, but not all of that time, Ruby was incarcerated. Ruby remainded incarcerated at the time of the termination hearing. Incarceration alone is not a mitigating factor which allows her more time to be able to care for the children. *See In re J.S.*, 470 N.W.2d at 51. We conclude the district court did not err in finding Ruby's parental rights should be terminated pursuant to section 232.116(1)(e).

Finally, Ruby disputes the district court's ruling terminating her parental rights pursuant to Iowa Code section 232.116(1)(k) (1995). Section 232.116(1)(k) permits

the district court to terminate the parent-child relationship if the court finds all of the following have occurred:

> (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 a severe, chronic substance abuse problem, and presents a danger to self or others as evidenced by prior acts.
> (3) There is clear and convincing evidence that the parent's prognosis indicates that the child will not be able to be returned to the custody of the parent within a reasonable period of time considering the child's age and need for a permanent home.

Ruby argues this section was not proven by clear and convincing evidence.

Our de novo review of the record reveals this issue is very close. Ruby began using drugs in 1983. While Ruby contends she has been drug free since 1994, she has spent most of this time in the controlled environment of prison. Ruby testified she has only gone through drug treatment once in 1990 which was court ordered. After going through treatment, she relapsed and continued to use of cocaine until 1994. Ruby testified she did not go through drug treatment when she discontinued use in 1994, nor has she gone through treatment since 1994. Ruby has not yet had the opportunity to prove herself outside of prison. There also is no evidence of a drug evaluation from which we can obtain evidence on a prognosis. However, as we need not address this issue due to the fact we have already found Ruby's parental rights should be terminated on three other grounds, we decline to determine if the district court erred in terminating Ruby's parental rights pursuant to section 232.116(1)(k).

Upon consideration of all arguments raised by Ruby on appeal, we affirm the district court's ruling terminating Ruby's parental rights.

AFFIRMED.