IN THE COURT OF APPEALS OF IOWA

No. 3-213 / 92-1923

FILED
JUN 29 1993
CLERK SUPREME COURT
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IN THE INTEREST OF B.W., B.W., and L.W., Minor Children.

P.W., Mother,
Appellant.

Appeal from the Iowa District Court for Marion County, Thomas W. Mott, Judge.

The appellant mother appeals from a judgment of the district court terminating her parental rights to her three minor children. **AFFIRMED.**

Ronald F. Walker of Hardin & Walker, Knoxvile, for appellant mother.

Bonnie J. Campbell, Attorney General, John M. Parmeter, Special Assistant Attorney General, and Charles K. Phillips, Assistant Attorney General, for appellee State of Iowa.

Gayle Nelson Vogel of Johnson, Lane & Vogel, Knoxville, for minor children.

Heard by Oxberger, C.J., and Donielson, J., and Keefe, S.J.*

*Senior judge from the 1st Judicial District serving on this court by order of the Iowa Supreme Court.

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KEEFE, S.J.

P.W. and J.W. are the parents of three minor children: L.W., a girl born in October 1987, and twins, Bryan and Brittny, born in August 1990.

On November 16, 1990, Brittny was taken to a chiropractor by her parents because she was having uncontrolled arm and leg movements. The chiropractor recommended she be seen by a medical doctor. The parents then took her to an emergency room, where doctors determined she was having brain seizures. She was subsequently transferred to a hospital in Des Moines.

The physicians who examined Brittny found her to be suffering from a combination of bilateral retinal hemorrhages, intracranial bleeding, and injuries to the brain. Dr. Randall Alexander, Dr. Wilber Smith, and Dr. Christopher Ellerbroek, all found Brittny's injuries were consistent with shaken baby syndrome. The physicians found evidence of at least two injuries to the brain. One injury occurred no more than forty-eight hours before her examination on November 16, 1990. At least one other injury occurred about ten days to three weeks prior to the examination. Brittny received permanent brain damage from being shaken.

The Department of Human Services (DHS) and police officials began investigating the case on November 17, 1990. P.W. and J.W. at first denied any knowledge of Brittny's injury. On November 29, 1990, P.W. told a police

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officer that she had shaken Brittny on one occasion about three weeks before the seizures started. On the same date, J.W. told a different police officer that he had shaken Brittny quite hard on one occasion about a month before the seizures started. The three children were removed from the home on the same day and placed in foster care.

DHS concluded the allegations of physical abuse and denial of critical care by P.W. and J.W. were founded. The grounds for the charge of denial of critical care were based on doctors' statements that Brittny would have exhibited symptoms of brain injury within minutes of being shaken. Brittny suffered her first injury some ten days to three weeks before her parents attempted to get medical attention for her.

DHS also received a report that about two weeks before she was hospitalized, J.W. had thrown Brittny about six feet across a room towards her playpen. Brittny hit both the top and bottom cross bar of the playpen with her head, and then landed on her face and stomach on the floor. Just prior to throwing her, J.W. had told her to shut up. DHS concluded the allegation of denial of critical care based on this incident was founded.

The State filed a petition alleging L.W., Bryan and Brittny were children in need of assistance (CHINA). On May 1, 1991, L.W., Bryan and Brittny were determined to be CHINA. At that time P.W. and J.W. had recanted their earlier statements that they had shaken Brittny. The court

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determined Brittny had been physically abused by both of her parents. The court found L.W. and Bryan were in imminent danger of physical abuse by both of their parents.

It was not until March 1992 that J.W. finally admitted that on the day she was hospitalized, November 16, 1990, he had shaken Brittny while P.W. was at the grocery store. He stated he had only shaken her on this single occasion.

DHS developed a case permanency plan for the family. P.W. and J.W. were given supervised visitation with the children. P.W. and J.W. started therapy with Janice Hill, a licensed social worker. J.W. reported he had been physically abused by his father, who was an alcoholic, until he was five years old. P.W. reported she had been physically abused by her father. She also stated she had been sexually abused by male relatives.

L.W., who had exhibited some behavioral problems, started therapy with Dr. Barbara Cavallin, a licensed clinical psychologist. The foster parents noticed that L.W. was not completely toilet trained. If L.W. would accidentally soil herself she would just stand and shake in fear. Alternatively, she would sometimes attempt to hide her soiled undergarments because of her fear of being spanked. When asked about this behavior, P.W. admitted they had spanked L.W. as part of her toilet training. There was also evidence L.W. was not nurturing towards her dolls; she did not want to feed them, and would beat them.

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Dr. Cavallin concluded this showed L.W. had not received very much nurturing in her home.

When Brittny was about seven months old, physical therapy testing showed development of about three and one-half months, and speech and psychological testing showed development of about four months. Brittny has eye strabismus, also known as "lazy eye" because of her injuries. She has delayed growth due to the injuries, and was not even on the growth chart for a child her age. Brittny has continuing health problems and was in the hospital at least eight times after she was removed from the parents' home.

When the parents began supervised visitation, P.W. would spend most of her time with L.W., and J.W. would spend most of his time with Bryan. However, when this was pointed out to them the parents began to spend a more equal amount of time with each child. DHS was also concerned that the parents did not understand that Brittny was developmentally delayed. P.W. and J.W. did complete classes at the Parent-Infant Nurturing Center (PINC).

P.W. became preoccupied with the children's health while they were in foster care. At times during visitation P.W. would ask L.W. inappropriate questions, such as "Do the foster parents hit you?" and "Do you get spankings?" The interrogation of L.W. caused her confusion, which resulted in her acting out behaviorally. P.W. would ask DHS workers to check L.W. for bruises. P.W. also took

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Bryan to a physician because she suspected he had bruises on his genitals. However, no bruises were found.

On February 10, 1992, P.W. and J.W. met with Dr. Randall Alexander in order to have Brittny's injuries explained to them. P.W. demonstrated for Dr. Alexander how she had shaken Brittny. Dr. Alexander stated this degree of shaking would not have resulted in the child's injuries. J.W. denied shaking Brittny, and stated he did not know serious injury could occur if a child was shaken. However, J.W. later admitted he did know because his nephew received severe brain injuries from being shaken.

In March 1992, after J.W. had admitted to shaking Brittny, P.W. and J.W. separated. However, P.W. continued to be supportive of J.W. P.W. and J.W. told DHS workers they had never felt closer. They also intimated the separation was to allow P.W. to gain custody of the children, and they intended to be reunited after this was accomplished.

Also, after he admitted to shaking Brittny, J.W. told his daughter, L.W., that he was going to jail and would never see her again. At different times he would tell her he was going to hell. Furthermore, L.W. reported that P.W. and J.W. had told her to tell Dr. Barbara Cavallin that "a neighbor gal shook, not her daddy, and that she had seen this." She was also instructed to tell Dr. Cavallin "to tell her friend, the judge, daddy didn't do it." Dr. Cavallin stated this was very upsetting and confusing for L.W.

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The State had filed charges against P.W. and J.W. for the crime of child endangerment resulting in serious injury based on Brittny's injuries. The charges against P.W. were dismissed on May 1, 1992. J.W. pled guilty to a charge of aggravated assault without serious injury.

The State filed a petition for termination of parental rights against P.W. and J.W. on June 10, 1992. On October 28, 1992, the district court entered a ruling terminating their parental rights. The court found neither P.W. nor J.W. could provide a safe or adequate home for the children. The court noted P.W. and J.W. had not accounted truthfully and satisfactorily for Brittny's severe injuries. The court also found that despite the receipt of services, the circumstances which led to the abuse continued to exist. P.W. and J.W. had services from DHS, Lutheran Social Services, clinical psychologist Dr. Barbara Cavallin, therapist Janice Hill, and the PINC program. However, P.W. and J.W. were still unable to provide a proper and safe home for the children. P.W. has appealed. J.W. has not appealed.

I. Our review in termination cases is de novo, but we give weight to the findings of the juvenile court, especially regarding the credibility of witnesses. In re A.R.S., 480 N.W.2d 888, 890 (Iowa 1992). The critical question, of course, is the best interests of the child. Id.

II. P.W. claims she did not receive a fair hearing. She states the court denied her a fair hearing by allowing

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the State to set a hearing date ex parte, by denying her a pretrial conference, by denying her motion for continuance, by denying her right to depose witnesses, by allowing J.W. to testify, and by taking judicial notice of the CHINA file.

The parent-child relationship is constitutionally protected. In re D.E.D., 476 N.W.2d 737, 739 (Iowa App. 1991). The State has the right to terminate the legal relationship between a parent and child, but the constitution limits its power to do so. Id. The State must meet due process requirements in a termination of parental rights procedure. Id.

On June 10, 1992, the juvenile court issued an order setting the case for trial on July 29, 1992. We find the State did not select the hearing date in the case, but that the date was selected by a juvenile court officer. We note that P.W. does not claim she did not receive notice of the hearing date.

On July 27, 1992, just two days before trial, P.W. asked for a continuance and a pre-trial conference. The juvenile court denied both of the requests on the ground they were untimely. We find P.W. was not denied a fair hearing because of the juvenile court's ruling. P.W. does not state how she was prejudiced by the court's ruling.

On July 28, 1992, the day before trial, P.W. notified the State she intended to take the depositions of two of the State's witnesses, an Iowa City physician and a Des

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Moines physician, that same day. The State did not comply with this request because there was not sufficient time to have these two professionals come to Knoxville for the depositions. P.W. has stated no reason why the depositions could not have been scheduled earlier.

In the middle of the trial, J.W. voluntarily went to DHS offices and revealed new information about P.W. The State then called J.W. as a witness. J.W. was a party to the case, and we find P.W. cannot claim J.W. was a surprise witness or that his testimony should not have been admitted.

Finally, we find no error in the juvenile court taking judicial notice of the CHINA file. If P.W. had an objection to any documents in the CHINA file, she should have raised her objections during the CHINA proceedings.

After examining each of these arguments, we conclude P.W. was not denied a fair trial. We find no evidence to show P.W. was denied any of her due process rights.

III. P.W. contends there was not clear and convincing evidence to show that L.W. cannot be safely returned to her custody. P.W. claims that she never shook Brittny hard enough to injure her, and that J.W. was the most likely perpetrator of both incidents of abuse. P.W. testified she had separated from J.W. and had moved to Tama, near her father. P.W. points out that her therapist, Janice Hill, testified that P.W. could probably assume custody of L.W. within three to six months.

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The termination of a parent-child relationship requires clear and convincing evidence. In re D.J.R., 454 N.W.2d 838, 845 (Iowa 1990). In determining the best interests of a child, we must consider what the future holds for the child if returned to the parent. In re M.M., 483 N.W.2d 812, 814 (Iowa 1992). Evidence of the parent's past performance is relevant on this issue because it may show the quality of future care the parent is capable of providing. Id. The goal of Iowa Code chapter 232 is to prevent probable harm to the child; the statute does not require delay until after the harm has occurred. Id. at 815.

The law demands a full measure of patience with troubled parents who attempt to remedy a lack of parenting skills. In re A.C., 415 N.W.2d 609, 613 (Iowa 1987). In view of this required patience, certain steps are required by chapter 232. Id. But, beyond the parameters of chapter 232, patience with parents can soon translate into intolerable hardship for their children. Id. It is unnecessary to take from the children's future any more than is demanded by statute. Id. at 614. Termination should occur if the statutory time period has elapsed and the parent is still unable to care for the child. In re M.Z., 481 N.W.2d 532, 536 (Iowa App. 1991).

We conclude the State has shown by clear and convincing evidence L.W. cannot be returned to P.W.'s care. P.W. previously admitted to shaking Brittny on one occasion,

although she now wants to argue that J.W. was responsible for both of the shaking incidents. As noted by the trial court, the fact that J.W. has only admitted to one incident makes it more likely that P.W. was the perpetrator of the other incident.

Furthermore, Dr. Cavallin testified that L.W. did not appear to be bonded with P.W. L.W. exhibited signs that she had received poor nurturing from her parents, and that she had been traumatized during toilet training by excessive spanking.

We find P.W. has failed to show she has rehabilitated herself sufficiently to allow her to resume custody of L.W. During the twenty months the children were in foster care, P.W. developed an obsession with criticizing the foster parents, which caused confusion to L.W. P.W. was also a party to the attempt to manipulate L.W. to pretend she had seen a neighbor shake Brittny.

Additionally, and probably most telling, at the time of trial P.W. had decided to move to Tama, in order to be near her father and his family. P.W. had admitted that she was physically and sexually abused as a child by her father and other male relatives. P.W.'s decision to attempt to raise the children in this environment shows she is not alert to the needs of the children and that she is still putting her own needs before the children's need for safety.

We conclude the State has shown by clear and convincing evidence that L.W. cannot be returned to P.W.'s care and

that it is in L.W.'s best interests to terminate P.W.'s parental rights. We affirm the trial court's decision terminating P.W.'s parental rights as to L.W.

IV. P.W. also contends the State did not present clear and convincing evidence to show Bryan and Brittny could not be returned to her care. Her arguments are the same as those raised concerning L.W.

The same evidence which supported the termination of P.W.'s parental rights as to L.W. also supports the termination of P.W.'s rights as to Bryan and Brittny.

In addition, the evidence showed Brittny suffers permanent brain damage and poor physical health. Because of these factors, she will need above-average parenting. There was no evidence to show P.W. was capable of meeting Brittny's increased needs. In fact, the evidence showed P.W. tended to minimize the extent of Brittny's injuries.

The evidence also showed that after the first shaking incident Brittny did not receive medical care for some period between ten days to three weeks. Dr. Alexander stated that Brittny would have exhibited symptoms within minutes after the shaking. Thus, even if P.W. was not the perpetrator of the first shaking incident, she denied Brittny the medical care she needed.

We also note that Bryan and Brittny are quite attached to each other and should not be separated. We conclude there is clear and convincing evidence to show Bryan and Brittny cannot be returned by P.W's care and it is in their

best interests to terminate P.W.'s parental rights. We affirm the decision of the trial court terminating P.W.'s parental rights as to Bryan and Brittny.

Upon our de novo review of the record in this case, we conclude appellant P.W.'s parental rights as to her children L.W., Bryan and Brittny should be terminated.

AFFIRMED.