IN THE COURT OF APPEALS OF IOWA

No. 5-193 / 94-1771

FILED
MAY 30 1995
CLERK SUPREME COURT

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

STATE OF IOWA,

Appellant.

Appeal from the Iowa District Court for Washington County, Lucy J. Gaman, Judge.

The State appeals the district court's ruling denying its petition to terminate the parents' parental rights over their minor child. **AFFIRMED.**

Thomas J. Miller, Attorney General, Gordon E. Allen, Deputy Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, and Barbara Edmondson, Assistant County Attorney, for appellant.

John E. Meyer, III, Independence, for mother-appellee.

Douglas L. Tindal of Shearer & Tindal, Washington, for father-appellee.

Clemens Erdahl, Iowa City, for minor child.

Stephen C. Gerard, II, of Gerard & Becker, Coralville, guardian ad litem for minor child.

Heard by Donielson, C.J., and Hayden and Sackett, JJ.

SACKETT, J.

The focal issue in this case is whether the juvenile court made the right determination about the future of Cassie, a child born in November 1984. Cassie, at the time of the order appealed from, was nearly ten years old and had spent five years living in six different foster homes. The juvenile court order refused the State's petition to terminate Cassie's parental rights and established conditions under which she could be returned to her parents' home where her older half sister, Gena, and her two younger brothers now live.

The State and guardian ad litem have appealed. The State filed a brief. The guardian ad litem did not file a brief but appeared at oral arguments and supported the State's appeal. The State's position is the juvenile court was wrong in (1) not terminating parental rights under Iowa Code sections 232.116(1)(c) and 232.116(1)(e) and (2) concluding the termination should not occur because of Cassie's objections and the close parent-child relationship. Cassie's attorney and her parents ask the juvenile court order be affirmed. We affirm.

Cassie's mother, Sharon, has five biological children. Cassie is her third child. Cassie's father, Greg, has three biological children. Cassie is his oldest child. Sharon had two older children with her first husband. Sharon transferred custody of her second oldest child, Dee, to the Department of Human Services. Dee has been adopted by another family. Sharon's oldest child, Gena, was born September 20, 1977. Gena and Cassie were removed from Sharon and Greg's care on July 12, 1989.

The removal came about because of allegations by Dee that Sharon and Greg had sexually abused her. Though adopted by another family, Dee stayed in the area where Sharon and Greg were living. Gena and Dee happened to meet at a social event and decided they wanted to establish a friendship. Dee's adoptive parents agreed to the girls establishing a friendship but demanded counseling as a condition. After a counseling session, Dee told her adoptive mother, for the first time, Sharon and Greg had sexually abused her. Dee had a medical examination. The findings were consistent with Dee's claims of abuse. As a result of Dee's allegations, Sharon and Greg were charged with sexual abuse and Gena, Cassie, and Trevor were removed from Sharon and Greg's home and placed in foster care. Greg and Sharon pled guilty to child endangerment. They were sentenced to thirty days in jail and two years probation. The children were subsequently found to be children in need of assistance.

An appeal from the order finding the children in need of assistance was taken to this court. We affirmed the finding the children were in need of assistance under Iowa Code sections 232.2(6)(b), 232.2(6)(c)(2), and 232.2(6)(d) (1991). We found, however, the juvenile court should have appointed an attorney for the children and remanded for that purpose. *In re G.Y.*, No. 90-1814, slip op. (Iowa App. Jan. 29, 1992). The supreme court took our case on further review. The supreme court vacated our decision and affirmed the judgment. *In re G.Y.*, 486 N.W.2d 288 (Iowa 1992). Additional hearings followed and a petition to terminate parental rights was

filed on May 10, 1994. The juvenile court denied the termination and this appeal follows.

The State and guardian ad litem advance Cassie was found to be a child in need of assistance on the basis of sexual abuse perpetrated by her parents; the parents have failed to admit the abuse and have not corrected the deficiencies in their home. They contend Cassie's parental rights should be terminated. The attorneys for Cassie and the mother and father ask the juvenile court order denying termination be affirmed. They recognize it was found Cassie had been sexually abused by her parents and the parents have never admitted the abuse. The parents advance, while the finding was made and affirmed, the juvenile court and this court have the right and responsibility, if it is in Cassie's best interest, to determine the finding was improvidently made and act accordingly. Both Cassie and the parents have denied the abuse for five years.

We review de novo. *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981). Although we are not bound by the findings of the juvenile court, we give weight to the juvenile court's findings of fact because that court has had the opportunity to hear and observe the witnesses. *See In re L.L.*, 459 N.W.2d 489, 493 (Iowa 1990); *In re S.V.*, 395 N.W.2d 666, 668 (Iowa App. 1986); Iowa R. App. P. 14(f)(7). We must review the record to determine whether the finding is supported by clear and convincing evidence. Iowa Code § 232.117(2) (1993).

Cassie was born November 5, 1984. She was removed from her parents' home on July 12, 1989. Cassie's older biological half sister, who is her mother's child, was voluntarily relinquished by her mother to the Department of Human Services in March 1986.

The parents have constantly and consistently denied the sexual abuse. The counseling and/or treatment programs the parents were directed to participate in required admissions of the abuse to provide treatment. This resulted in the parents not following the ordered programs.[1] The parents ultimately found their own counselor and participated in counseling.

Both Gena and Cassie constantly and continually denied sexual abuse. Gena is bitter about being out of her family home for over four years. She said her problems with her parents had been their manner of punishment and their placing too many responsibilities on her. Gena felt her problems could well have been addressed in her home. She did not believe her years of counseling benefitted her.

Cassie testified when her parents and their attorney were not present. She testified she considers Greg and Sharon her family, she wants to live with them, and

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[1] A recent juvenile conference sponsored by the Iowa Supreme Court included a speaker who gave the opinion that admission should not necessarily be a requirement for admission in a sexual abuse treatment offenders program. She suggests there are several reasons for her position. Clearly, there are cases when people who are charged and found to be sexual abusers have not perpetrated the abuse. Secondly, and also importantly, by requiring an admission, sexual abusers who are in fact perpetrators and who are in need of treatment are denied treatment. She says through treatment such persons on many occasions finally admit their guilt, and, even if they do not, they are forced by the programs to face their problems and learn how to deal with them.

she misses her siblings and her aunts and uncles. She testified she would tell someone if her mother or dad hurt her. Cassie has little memory of life at home. The memories she had were pleasant, baking cookies with her mother, riding on her father's golf cart. She had happy memories of visits with her parents before the visits were discontinued.

The juvenile court made extensive and complete findings. The court obviously put considerable effort in the order and we have found it extremely helpful in reviewing this case on appeal. As part of the findings, the court said:

> [T]he Court wishes to address the Petitioner's [State's] view that Cassie should not be returned home because it leaves the impression that the parents have successfully worn down the system to the point "where everyone throws up their hands and says, 'I quit, take the child back.'" . . . [T]he fact that this case has taken so long to resolve is due in part to the [parents] vociferously asserting their due process rights, including the right to appeal. But an additional cause of delay has been the difficulty of accommodating a court schedule in which a judge is never present for more than two days at a time, with the schedule of five attorneys involved in this case. Moreover, as the Petitioner [State] points out, if the [parents] had immediately admitted they were sexual perpetrators and completed treatment, they might have their daughters back within two years. The [parents] have paid an extremely high price for standing on their principles. They have lost four years out of Gena's life and over five years out of Cassie's. Their heartbreak has been obvious in the courtroom.

The relationship between the Department of Human Services and the parents was strained. The home of one social worker involved in the case was picketed by Greg's father. The problems have now been resolved. The order of the juvenile court makes return of Cassie contingent on the parents' cooperation. The juvenile court

found, and we agree, the evidence shows the parents have accepted the need to cooperate and will do so to have their children returned.

We agree with the juvenile court, there is not clear and convincing evidence the parents at this time pose a harm of sexually abusing Cassie. Furthermore, and additionally important, is the finding supported by the position of Cassie's attorney and Cassie's testimony in the absence of her parents and their attorneys that if something happens to her she knows to whom and how to report it and is of an age to understand and make appropriate phone calls.

We recognize, as did the juvenile court, on the record now there is a question whether the finding of sexual abuse by the parents was correct. The parents contend we should not be bound by the prior adjudication but consider the best interest of the child and the dictates for preservation of family.

The issue need not be addressed. This appeal is not from a removal hearing but is from a hearing to determine whether termination should occur. The focal question is whether now, not when the child was removed, the parents are suitable. We consider the situation today in the context of the entire proceedings.

We do note, however, Dee spent little time in Sharon and Greg's custody and she may not have identified the correct perpetrator. Dee was born on July 16, 1980. When she was born, her father, Gary, was in prison. He was released in March 1981, and returned to prison in November 1982. While home, he physically abused Dee and Gena. He abused alcohol and Sharon.

In February 1983, Sharon left Gena and Dee with her mother and stepfather. In mid 1983, Sharon divorced Gary and married Greg. The girls stayed with their grandmother and step-grandfather until July 1984, when the grandparents were not able to care for the children any longer. The children were placed, on a trial basis, in a home in Charles City. In August 1984, Sharon had the children moved to G.H. and J.H.'s home. J.H. was named guardian. During this period, there were allegations the children were sexually abused and, after an investigation, the allegations were determined unfounded.

By August 1985, J.H. terminated guardianship and returned the children to Sharon and Greg. There were problems. Sharon thought it best Gena and Dee be placed for adoption, and she contacted the Department of Human Services for help. Counseling was instigated. Ultimately, Sharon consented to termination of parental rights to Dee.

During the time Gena and Cassie were in the care of others, Sharon had little contact with them.

The State first contends in 1990 there was a finding Sharon and Greg had sexually abused Dee, Gena, and Cassie and, five years later, the parents still deny they did it and refuse court-ordered treatment. The State contends, therefore, the circumstances have not changed. The State says the juvenile court incorrectly concluded the circumstances of sexual abuse do not continue to exist. The State contends the parents have sabotaged therapeutic efforts and their behavior caused

visits with the children to be terminated and the parents then moved out of state. The State says the parents did not encourage the girls in therapy and healing. The State further points out, in September 1993, the juvenile court found no point in waiting for the parents to get treatment and ordered a termination petition to be filed.

The State contends the fact Gena and Trevor have not been sexually abused should not have been considered by the juvenile court to find the home satisfactory for Cassie. The State contends it was not probable she was sexually abused. The State also contends social workers who entered the home saw the parents had some problems but did not see obvious signs of physical or sexual abuse and Dee did not report she had been sexually abused until she had been out of the home for three years.[2]

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[2] The State, while advancing these factual arguments in the first point of its brief, makes not one single reference in this section to the appendix or record page where testimony or findings supporting these conclusions appear. As in *In re R.B.*, 493 N.W.2d 897, 900 (Iowa App. 1992), the State counsel is directed to Iowa Rule of Appellate Procedure 14(a)(5) and 14(b) which provide directions on filing briefs and making reference to cited evidence. These sections provide in relevant part:

> (5) An argument. The argument shall contain . . . stated issues the contentions of the appellant with respect to the issues presented and the reasons therefor, with citations to the authorities relied on and to the pertinent parts of the record in accordance with subdivision (g). (Emphasis added).

Iowa R. App. P. 14(a)(5).

> (b) **Appellee's Brief**. The brief of the appellee shall conform to the requirements of subdivision (a)(1) to (6), . . . (Emphasis added).

Iowa R. App. P. 14(b)

In Division II, the State argues Cassie has been found to be a child in need of assistance, has been out of her home since 1989 and cannot be returned, and the juvenile court erroneously concluded she could be returned to her parents' home even though her parents have never dealt with her sexual abuse.

The State criticizes the juvenile court for relying on Gena's successful return home, Cassie's progress in therapy, the observation of a family friend, the testimony of Sharon and Greg, and the testimony of Dr. Pinto as factors to consider in its decision. The State contends, unlike Gena, Cassie is still a child and she should not be forced to protect herself when her parents have not protected her. The State says, in the permanency order, the court found Gena had made changes, not her parents. The State advances this is also the case with Cassie but she is younger and has grown up in a world of secrets. The State says, even in foster care, Cassie's parents encouraged secrecy and she has demonstrated loyalty to her parents who call her a little princess. The State says to expect her to protect herself is dangerous and to ascertain her safety would be difficult.[3]

The State then goes on to include findings of the court at a permanency hearing that the parents were found on psychological evaluations to be prone to deny. The court found, while the fact they denied sexual abuse did not prove they were sex

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[3] Again, the State has advanced these factual arguments in support of the second brief point without any reference to the appendix or record page where testimony or findings supporting these factual conclusions appear. This makes review of the State's position extremely difficult.

offenders, they had been found to be and had been ordered to obtain treatment and the court concluded they probably are untreated and would offend again.

The State goes on to say there is nothing to indicate the parents changed in a year in what the State calls "dabbling in family therapy" has not changed the fact the parents still deny they sexually abused the girls and their credibility is suspect. The State also criticizes the juvenile court for relying on the testimony of Pinto.

The State goes on to say Cassie has lived in a world of secrets and has buried them and has progressed in foster care and has shown she can make attachment.[4]

The State has labeled the juvenile court's re-assessment of the facts as "nonsensical". We find the juvenile court's assessment well reasoned and supported by the following evidence:

1. Additional successful family therapy sessions which included Gena have taken place.

2. The family has returned from Chicago to Cedar Rapids primarily for the welfare of the children.

3. Gena has successfully returned to the family home and developed a close relationship with her brothers.

4. Cassie has matured and become quite articulate about her strong desire to be reunited with her family and about her strong aversion to adoption.

5. Greg has matured and learned from family therapy.

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[4] Once again, these factual allegations are made without reference to an appendix or record page.

6. Sharon has matured and demonstrated her willingness to report potential sexual abuse to the authorities.

7. Cassie has reported potential sexual abuse in the foster home to the authorities.

8. The family living situation has improved and a very warm and spacious family environment in Iowa has been established.

There is substantial evidence to support the juvenile court's findings. We give credence to these findings.

The State contends Cassie has an excellent chance of being adopted. The adoption specialist testified Cassie does not have a lot of educational or diagnostic problems which would prevent her from being adopted. She said Cassie is able to adjust and attach, she has a lot of humor, she's got some talent with the violin and art work and things like that would make her potential to be adopted very high.

The State's last contention is Cassie has been out of her parents' home since she was four and one-half. The State criticizes the juvenile court's finding Cassie's bond to her parents is strong enough to prevent a successful adoption as not supported by the evidence. The State says the therapist testified at the termination hearing Cassie has distanced herself emotionally from her parents to get on with her life.

The State says the record shows Cassie became distressed with visits and Sharon and Greg sabotaged therapy.[5]

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[5] Once again, the State fails to support these factual allegations with reference to an appendix or record page.

The attorney for Cassie says the juvenile court is correct.

He advances the State's argument the juvenile court's conclusions were "incredible" and made "a tremendous leap of logic" are outside the bounds of proper argument. We agree. The State's characterizations of the juvenile court's findings are contrary to our characterizations of the juvenile court's findings. We determine the juvenile court's findings are well reasoned and supported by the evidence.

There is integrity in the family unit. *In re Wall*, 295 N.W.2d 455, 457 (Iowa 1980). The right to raise one's children is an essential, basic civil right, a right "far more precious than property rights." *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212, 31 L. Ed. 2d 551, 558 (1972). Termination is a drastic, final step which improvidently employed can be fraught with danger. Accordingly, to preserve the best interest of both parents and children, termination must only occur where more harm is likely to befall the child by staying with his or her parents than by being permanently separated from them. *Alsager v. District Court*, 406 F. Supp. 10, 24 (S.D. Iowa 1975). The State's interest in protecting children must be balanced against the parents' countervailing interest in being able to raise their children in an environment free from government interference. *Alsager*, 406 F. Supp. at 22. The issue of whether or not to legally sever the biological ties between parent and child is an issue of grave importance with serious repercussions to the child as well as the biological parents. *In re R.B.*, 493 N.W.2d 897, 899 (Iowa App. 1992). The State must prove by clear and convincing evidence the allegations contained in the

termination petition. *See In re T.B.B.*, 460 N.W.2d 881, 882 (Iowa App. 1990); *In re K.M.R.*, 455 N.W.2d 690, 693 (Iowa App. 1990); *In re C.M.T.*, 433 N.W.2d 55, 56 (Iowa App. 1988); *Santosky v. Kramer*, 455 U.S. 745, 770, 102 S. Ct. 1388, 1402, 71 L. Ed. 2d 599, 617 (1982); Iowa Code § 232.117(2) (1993).

We find the State has failed to prove by clear and convincing evidence the allegations contained in its termination petition.

We affirm.

AFFIRMED.