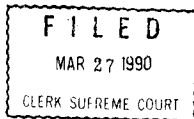


IN THE COURT OF APPEALS OF IOWA

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No. 0-62 / 89-1534

IN RE T.B.B.,
A Minor Child;
M.B. and L.B., Parents,
Appellants.



Appeal from the Iowa District Court for Linn County,
Robert E. Sosalla, District Associate Judge.

Appellants appeal from a decision of the juvenile court
terminating their parental rights to their son. **REMANDED
WITH DIRECTIONS.**

Thomas J. O'Flaherty, Cedar Rapids, for appellants.

Thomas J. Miller, Attorney General, Gordon E. Allen,
Deputy Attorney General, and Judy Sheirbon, Assistant
Attorney General, for appellee, the State of Iowa.

Heard by Donielson, P.J., and Hayden and Habhab, JJ.

HABHAB, J.

Appellants, M.B. and L.B., appeal from a decision of the juvenile court terminating their parental rights to their son, T.B.B. Appellants contend the State failed to prove by clear and convincing evidence that termination of their parental rights pursuant to Iowa Code section 232.116(1)(E) (1989) was appropriate. We order a limited remand.

T.B.B. was born on October 23, 1987. On February 29, 1988, T.B.B. was removed from his parents' home pursuant to an emergency removal order. On March 28, 1988, based upon a stipulation of the parties, T.B.B. was adjudicated to be a child in need of assistance. These actions were the result of T.B.B.'s failure to gain weight and his subsequently being diagnosed as a failure to thrive child. It seems T.B.B. had difficulty keeping his formula down, and appellants were unable to take adequate measures to correct the problem.

The Department of Human Services developed a case permanency plan with the goal of family reunification. By December 23, 1988, sufficient progress had been made by appellants on the case permanency plan that T.B.B. could be placed back in the parental home on a trial basis. T.B.B. weighed 23 pounds, 8 ounces upon his return to his parents. By January 19, 1989, T.B.B.'s weight was down to 21 pounds, 8 ounces. This weight reduction, combined with bruises and bite marks on T.B.B., caused DHS workers to

become concerned for his well-being. Appellants explained to the DHS workers that the bruises and bite marks were the result of actions by T.B.B.'s two-year-old brother, M.B., Jr., because of his jealousy toward T.B.B. DHS workers informed appellants that they needed to more closely supervise T.B.B. in order to prevent further injuries.

T.B.B., however, continued to lose weight and continued to receive bruises and bite marks from his brother, M.B., Jr. T.B.B.'s weight was down to 21 pounds on February 2, 1989. On February 9, 1989, DHS again removed him from the parents' home. DHS subsequently brought this action to terminate appellants' parental rights to T.B.B.. The juvenile court determined that clear and convincing evidence existed that T.B.B. was imminently likely to suffer harmful effects due to the failure of appellants to exercise a reasonable degree of care in his supervision. As a result, the juvenile court terminated appellants' parental rights to T.B.B. pursuant to Iowa Code section 232.116(1)(e).

Appellate review of termination proceedings is de novo. In re W.G., 349 N.W.2d 487, 491 (Iowa 1984), cert. denied, 469 U.S. 1222, 105 S. Ct. 1212, 84 L. Ed. 2d 353 (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. The State must prove by clear and convincing evidence the allegations found in the

termination petition. See In re C.M.T., 433 N.W.2d 55, 56 (Iowa App. 1988). Iowa Code section 232.116(1)(e) (1989) permits the juvenile court to terminate the parent-child relationship if the child has been adjudicated in need of assistance, has been placed out of the parent's custody for more than twelve of the last eighteen months, and there is clear and convincing evidence that the child will suffer harm specified in Iowa Code section 232.2(6) (1989) if returned to the parent. See In re K.L.C., 372 N.W.2d 223, 227 (Iowa 1985).

Appellants concede that the first two requirements of Iowa Code section 232.116(1)(e) have been met. Therefore, the only question remaining concerns whether the third prong has been met. The issue then is whether there is clear and convincing evidence that T.B.B. cannot be returned to appellants' custody, as provided in section 232.102. Section 232.102(4), Iowa Code (1989), provides in pertinent part:

Custody of the child should not be transferred unless the court finds that there is clear and convincing evidence that:

* * *

- (b) The child cannot be protected from some harm which would justify the adjudication of the child as a child in need of assistance and an adequate placement is available.

As a result, the requirement found in section 232.116(1)(e) is satisfied when the child cannot be returned to the parental home because of the existence of facts which would

satisfy any definition of a child in need of assistance pursuant to Iowa Code section 232.2(6) (1989). See In re A.M.S., 419 N.W.2d 723, 725 (Iowa 1988). Section 232.2(6) provides in pertinent part:

"Child in need of assistance" means an unmarried child:

* * *

- c. Who has suffered or is imminently likely to suffer harmful effects as a result of:

* * *

- (2) The failure of the child's parent . . . to exercise a reasonable degree of care in supervising the child.

The State relies upon the assaultive behavior of M.B., Jr. and T.B.B.'s weight loss while in appellants' care to satisfy this third element. The record evidence, however, does not disclose if T.B.B. will outgrow the special nutritional actions which have so far been necessary for his continued development. Additionally, the record is sketchy as to M.B., Jr.'s physical actions toward T.B.B. since the February 1989 removal of T.B.B.

Upon thorough review of the record in this case, we feel it necessary to retain jurisdiction but remand, in accordance with Iowa Rule of Appellate Procedure 12(g), to the juvenile court for the limited purpose of enabling the trial court to take additional evidence concerning M.B., Jr.'s deep-seated jealousy toward T.B.B. and whether this demeanor is of a nature which M.B., Jr. will outgrow. Additionally, the trial court shall take additional medical

evidence as to the causes and prognosis of T.B.B.'s ³⁵weight losses and what future treatments or actions will be necessary to ensure T.B.B.'s continued growth. Finally, the trial court shall take additional evidence concerning whether appellants possess the ability to supervise M.B., Jr. in the future to prevent a reoccurrence of injuries to T.B.B. and whether they can provide T.B.B. with the requisite treatment or care in order to assure his continued growth. Upon consideration of this additional evidence, the trial court shall then modify or affirm its prior order.

A copy of the transcript of additional evidence and the trial court's order shall be filed with the Clerk of the Supreme Court no later than six weeks following the filing of this decision. No further briefs shall be filed unless requested by this court.

REMANDED WITH DIRECTIONS.