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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN THE INTEREST OF L.O.,	)	
A Child;	)	Filed April 8, 1983
L.B.O., Natural Mother,	)	3-21
Appellant.	)	3-68745

Appeal from Story District Court - Gordon Speights Young, Judge.

The natural mother of a three-year-old child appeals from the trial court order terminating her parental rights pursuant to Iowa Code § 232.116(5) (1981). AFFIRMED.

Jane M. Mathison of Pasley, Singer, Pasley, Holm, Timmons & Mathison, Ames, for appellant mother.

Thomas J. Miller, Attorney General, Gordon E. Allen, Special Assistant Attorney General, and Brent D. Hege, Assistant Attorney General, for appellee State of Iowa.

Victor G. Lathrop of Payer, Steensland & Lathrop, Ames, for the child.

Considered by Oxberger, C.J., and Donielson, Snell, and Schlegel, JJ.

DONIELSON, J.

The natural mother of a three-year-old child appeals from the trial court order terminating her parental rights pursuant to Iowa Code § 232.116(5) (1981). The natural mother asserts on appeal that the termination was improper (1) because the placement of her child in a foster home following a child-in-need-of-assistance adjudication was not reviewed after six months as required by section 232.102(6); and (2) because there was insufficient evidence that the child could not be returned to her custody. We affirm.

Appellate review of proceedings to terminate a parent-child relationship is de novo and, while we accord weight to the findings of the trial court, we are not bound by those findings. In Interest of Dameron, 306 N.W.2d 743, 745 (Iowa 1981).

I.

On October 9, 1979, the mother, L.B.O., was admitted to a psychiatric hospital, leaving no one to care for her ten-month-old son, L.O. Soon thereafter, the State filed a petition requesting that L.O. be adjudicated a child in need of assistance. The parties stipulated to a child-in-need-of-assistance adjudication, and a dispositional hearing was then held. On March 5, 1980, the trial court entered an order placing L.O. in foster care through the Department of Social Services. L.B.O. remained under psychiatric care and unable to return to the community up to and including the time of the termination hearing in 1981. Letters were sent to counsel for all parties informing them of the situation and requesting that the six-month review hearing be waived. No action was taken until the present petition for termination of L.B.O.'s parental rights was filed March 11, 1981, pursuant to section 232.116(5)(c).

The termination hearing was begun but was continued for six months after the court was informed that L.B.O. had made some progress in her treatment. At the end of the resumed hearing, L.B.O. moved to dismiss the action, asserting that

there had not been a six-month review of the March 5, 1980 placement order as required by section 232.102(6). The court denied the motion on the ground that L.B.O. had waived the hearing by failing to object to the social worker's request that the hearing be waived so as not to jeopardize L.B.O.'s opportunity to adjust back into the community. The court entered an order terminating L.B.O.'s parental rights and transferring permanent custody and guardianship of L.O. to the Department of Social Services. L.B.O. then instituted this appeal.

II.

L.B.O. contends that, since a hearing pursuant to section 232.102(6) was not held six months after the initial transfer of L.O.'s custody, the court could not terminate her parental rights under section 232.116(5). The court ruled that the six-month review of the CHINA placement had been waived.

It appears from the record that on October 10, 1980, a Department of Social Services social worker wrote the trial court a letter stating that L.B.O.'s doctor felt that she was not yet able to return to the community. The social worker recommended that "a hearing be waived at this time so as not to jeopardize L.B.O.'s opportunity to make an adjustment in the community. I would request that a hearing be held within thirty days following [L.B.O.'s] return to the community." The social worker sent copies of the letter to counsel for all parties and none objected. On December 11, 1980, the social worker wrote the trial court another letter stating that L.B.O. had suffered a setback and that it was not known when she could return to the community. Again the social worker sent copies of the letter to all counsel, and again none objected. We stress that the social worker specifically requested a waiver of the hearing and at no time did she or her counsel object or request that the hearing be held at a later point in time. In fact, L.B.O. did not even complain of the failure to hold the CHINA review hearing until the second hearing on the termination petition. Nothing was said of

this matter during the first hearing on the petition. The court continued the termination hearing due to the receipt of information suggesting that L.B.O.'s condition was improving.

Under these circumstances, we believe the court correctly concluded that L.B.O. had waived the six-month hearing. As expressed in subsection 6, the purpose of such a hearing is to "review the placement in order to determine whether the child should be returned home, an extension of the placement should be made, or a termination of the parent-child relationship should be instituted." (emphasis added). A hearing was not held for fear that L.B.O.'s progress would be set back. The ultimate result of the hearing being waived was that the placement of L.O. was extended. The same result was effectuated after the initial hearing on the petition to terminate L.B.O.'s parental rights where the placement of L.O. was extended for an additional six montns. Thus the court's action served the same purpose as a review hearing would have under these particular facts. To have held an additional review hearing at that time would have been merely academic; the issue to be resolved therein would present a moot question. See In re Interest of Meek, 236 N.W.2d 284, 287-88 (Iowa 1975)(recognizing as moot those issues which no longer present a justiciable controversy but which have become merely academic). Here the court determined in the best interest of L.O., and in all fairness to L.B.O., that the temporary placement should continue until L.B.O.'s progress could be checked. We fail to see how L.B.O. can now complain that she did not voluntarily and intentionally waive the CHINA review hearing and that she was prejudiced as a result. See Iowa Grain v. Farmers Grain and Feed Co., 293 N.W.2d 22, 25 (Iowa 1980). L.B.O.'s motion to dismiss for failure to hold the review hearing was properly overruled and we hold that, under these circumstances, the waiver of the formal review hearing does not bar the termination of L.B.O.'s parental rights.

III.

On the merits, appellant L.B.O. asserts that there is no clear and convincing evidence that the child cannot be returned to her custody as provided in section 232.102. In examining the record before us, we are guided by well-established principles which were stated by the court in the Dameron case.

> Central to a determination of this nature are the best interests of the child. [citation] In this connection, we look to the child's long range as well as immediate interest. Hence, we necessarily consider what the future likely holds for the child if returned to his or her parents. Insights for those determinations can be gained from evidence of the parents' past performance, for that performance may be indicative of the quality of the future care that parent is capable of providing. [citations]
>
> This court has often recognized that there exists a parental interest in the integrity of the family unit; nonetheless we also are cognizant that this interest is not absolute, but that it may be forfeited by certain parental conduct. [citations] Because the State as parens patriae, has the duty to assure that every child within its borders receives proper care and treatment, it must intercede when parents abdicate that responsibility. [citations]
>
> Furthermore, it is our view that the current statutory termination provisions applicable here, like those they replace, are preventive as well as remedial. The provisions therefore mandate action to prevent probable harm to a child and do not require delay until harm has occurred. [citations]
>
> Finally, as previously noted, the grounds alleged here for the termination of parental rights must by statute be proven by clear and convincing evidence. [citation]

306 N.W.2d at 745. Of particular importance to the resolution of this controversy is the court's determination of the standard of the parties' burden of proof under Iowa Code § 232.116(5)(c).

> The reference to section 232.102 creates a burden of proof problem that we have recognized, but not previously resolved. See In re Dameron, 306 N.W.2d 743, 744, 747 n.4 (Iowa 1981); In re Adkins, 298 N.W.2d 273, 278 (Iowa 1980). The problem is that section 232.114(5)(c) requires clear and convincing proof that the child cannot be returned to the custody of the parents, whereas section 232.102(6) requires

> temporary placement be terminated and the child returned to his home if the court finds, by a preponderance of the evidence, that the child will not suffer harm in the manner specified in section 232.2(5). see e.g., In re Blackledge, 304 N.W.2d 209, 214-15 (Iowa 1981). We resolve this conflicting standard of proof problem by holding that in the termination of parental rights context, the clear and convincing standard of section 232.114(5) prevails and applies to the showing of harm requiring pursuant to section 232.2(5). In other words, before a termination of parental rights can occur under section 232.114(5), there must be clear and convincing proof that the child will suffer harm in the manner specified in section 232.2(5). This is the minimal burden of proof now required in this type of case by the due process clause of U.S. Const. amend. XIV. Santosky v. Kramer, ___ U.S. ___, ___, 102 S. Ct. 1388, ___, 71 L. Ed. 2d 599, 603 (1982).

In Interest of Chad, 318 N.W.2d 213, 219 (Iowa 1982).[1] With these principles in mind, we examine the merits of this controversy.

Our de novo review convinces us that there was sufficient evidence that the child could not be returned to L.B.O. and that her parental rights should, therefore, be terminated. The mere fact that a parent has a mental disability will not require termination of his or her parental rights; only when that disability affects the welfare of the child will it become a proper consideration in determining whether the parent-child relationship should be severed. This point was made in In re Interest of O'Neal, 303 N.W.2d 414, 422 (Iowa 1981), where the court noted that:

> [m]ental disability, standing alone, is not a sufficient reason for the termination of the parent-child relationship, but it is a contributing factor to the inability to perform the duties of a parent. In re Wardle, 207 N.W.2d at 563. Thus, mental disability is a proper factor to consider in determining whether a child is neglected to the point where his or her interest and welfare require termination of the parent-child relationship. Id.

L.B.O. suffers from a chronic mental illness similar to schizophrenia. From 1969, she has been hospitalized and receiving treatment. However, the treatment

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1 Section 232.114 was renumbered section 232.116 in the 1981 Code.

has not been successful and she admitted at the hearing that she was not yet capable of living independently or providing for L.O. Those who testified at trial included, among others, a psychiatric social worker, the supervisor of adult programs of the Department of Social Services, various personnel from the Story County Care facility, and other social workers from Story County. From their testimony, it appears that L.B.O. functions better in a dependent or structured living situation where she does not have to attend to her own needs or responsibilities. There is evidence that she is experiencing motivational difficulties and does not appear to be setting or achieving goals aimed at totally recovering from her mental illness. Many of the witnesses testified as to the lack of L.B.O.'s parenting ability and, while we are not bound by them, such experts' recommendations are afforded some weight. See In Interest of Osborn, 220 N.W.2d 632, 633-34 (Iowa 1974). Moreover, it appears from the record that L.B.O. was, on occasion, unable to keep her visitation appointments with L.O. because she was feeling extremely anxious, out of control and afraid that she may become violent and physically harm someone. Under these circumstances, we believe the trial court correctly concluded that L.B.O.'s mental problems posed a danger to L.O. and that L.O. could not be returned to her. As has been noted repeatedly, "[o]ur termination statute is preventative as well as remedial and does not require delay until after harm has been done." O'Neal, 303 N.W.2d at 423. Accordingly, we affirm the termination of L.B.O.'s parental rights.

AFFIRMED.