IN THE COURT OF APPEALS OF IOWA

No. 3-489 / 93-306

FILED
NOV 29 1993
CLERK SUPREME COURT

IN THE INTEREST OF C.M.B., a/k/a C.M.C.,
A Minor Child,

D.B., Mother,
Appellant.

D.C., Father,
Appellant.

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

The biological mother and father appeal the district court's judgment terminating their parental rights to their minor child. **AFFIRMED.**

Kevin D. Engels, of Correll & Sheeres, Cedar Falls, for appellant-mother.

Carter Stevens of Beecher, Rathert, Roberts, Field, Fister, Walker & Morris, P.C., Waterloo, for appellant-father.

Donna Lesyshen or Tyler & Lesyshen, Waterloo, for appellant-intervenors L.S. and S.S.

Bonnie J. Campbell, Attorney General, John M. Parmeter, Special Assistant Attorney General, Judy Sheirbon, Assistant Attorney General, and Daniel Block, Assistant County Attorney, for appellee-State.

Steven D. Moore of Redfern, Mason, Dieter, Larson & Moore, Cedar Falls, for appellee-intervenors L.D. and P.D.

Heard by Schlegel, P.J., Hayden, J., and McCartney, S.J.* Donielson, J., takes no part.

*Senior judge from the 2nd judicial district serving on this court by order of the Iowa Supreme Court.

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SCHLEGEL, P.J.

The district court terminated the parental rights of the biological mother and father pursuant to Iowa Code section 232.116(1)(g) (1991) and transferred custody and guardianship to the child's aunt and uncle. This order was stayed; following a rehearing, custody of the child was transferred to the foster parents. The mother and father appeal. They argue: (1) insufficient evidence existed to support termination of their parental rights; and (2) the district court erred in permitting the foster parents to intervene. The aunt and uncle intervene as appellants, arguing the district court erred in transferring custody of the child to the foster parents.

C.M.B. was born June 25, 1991, to parents that never married. The mother is thirty-five, and the father is twenty-seven. In 1982 the mother sustained permanent brain damage after she attempted to commit suicide through carbon monoxide poisoning. The mother is unable to care for herself due to poor balance, slow mental functioning, and poor memory retention.

In 1989 the father began a job as the mother's in-home caretaker. The father has a history of alcohol abuse leading to criminal convictions. In February 1991 he was found to have physically abused the mother. Evidence exists indicating he assaulted the mother on at least one other occasion. The couple separated for six weeks prior to C.M.B.'s birth. At the time of birth the father was unemployed, and the parents were living with a friend.

Because of the mother's physical and mental conditions and the father's substance abuse, unemployment, and physical abuse of the mother, C.M.B. was removed from her parents' care at birth. She was placed in foster care since no relative came forward as a placement option. At a hearing on July 22, 1991, the parents stipulated to C.M.B. being a child in need of assistance pursuant to Iowa Code section 232.2(6)(n) (1991). The court found the father should receive a substance abuse evaluation. C.M.B. was placed in foster care. The State began providing services to the parents. These included special services tailored to the mother's physical and mental limitations.

At an October 1991 dispositional hearing the parents stipulated that C.M.B. needed continued foster care. At a January 1992 review hearing the court ordered increased visitation, on-going participation by the parents with in-home services, and out-patient substance abuse counseling for the father. At an April 1992 dispositional review hearing the court found the parents had been offered extensive services by the Iowa Department of Human Services and other community agencies. The court stated:

> Notwithstanding these services, the parents are unable to adequately demonstrate in supervised situations that they can provide minimally adequate care for the child on a 24-hour basis.

The court warned the parents that the State would file a termination petition if the parents were unable to make substantial progress.

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In September 1992 the State filed a termination petition. In October the paternal aunt and uncle filed a petition seeking to intervene and to become C.M.B.'s adoptive parents. They requested a home study and stated they did not resist termination.

At the termination hearing, the court heard testimony from two occupational therapists who had worked with the mother and two caseworkers who had worked with the family. The court also heard testimony from the parents, the paternal aunt and uncle, an investigator for the guardian ad litem, and a private adoption investigator, among others. On February 8, 1993, the court filed an order terminating both parents' rights pursuant to Iowa Code section 232.116(1)(g) (inability to return child less than three years old who has been adjudicated CINA and placed outside the home for six months).

The court placed guardianship and custody of C.M.B. with the paternal aunt and uncle for the purpose of adoption. On February 11, 1993, the foster parents filed a petition to intervene for the purpose of seeking guardianship and custody of C.M.B. The court stayed transfer of custody to the paternal aunt and uncle. The court held a further evidentiary hearing on March 4, 1993. The district court denied the father's application to be present at this hearing. The court, based on C.M.B.'s best interests, ordered placement and guardianship be with the foster parents. The father, mother, and paternal aunt and uncle appeal. We affirm.

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.

The primary concern in termination proceedings is the best interest of the child. Iowa R. App. P. 14(f)(15); In re Dameron, 306 N.W.2d 743, 745 (Iowa 1981).

> We look to the child's long-range, as well as immediate, interests. We consider what the future holds for the child if returned to his or her parents. Insight for this determination can be gained from evidence of the parent's past performance, for that performance may be indicative of the quality of the future care the parent is capable of providing. Our statutory termination provisions are preventative as well as remedial. They are designed to prevent probable harm to a child.

In re R.M., 431 N.W.2d 196, 199 (Iowa App. 1988) (citing Dameron, 306 N.W.2d at 745).

In order to terminate parental rights pursuant to Iowa Code section 232.116(1)(g), the State must prove the following four factors by clear and convincing evidence:

> (1) The child is three years of age or younger.
> (2) The child has been adjudicated a child in need of assistance pursuant to section 232.96.
> (3) The custody of the child has been transferred from the child's parents for placement pursuant to section 232.102 for at least six months of the last twelve months, or for the last six consecutive months and any trial period at home has been less than thirty days.
> (4) There is clear and convincing evidence that the child cannot be returned to the custody of the child's parents as provided in section 232.102 at the present time.

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Id. The natural parents contend the fourth element of this section was not proven by clear and convincing evidence. We disagree.

> Our court has specifically held this subsection is met "when the child cannot be returned to the parental home because the definitional grounds of a child in need of assistance, Iowa Code § 232.2(6), exist." In re M.L.W., 461 N.W.2d 609, 611 (Iowa App. 1990)(citing In re A.M.S., 419 N.W.2d 723, 725 (Iowa 1988)).

In re A.L., 492 N.W.2d 198, 202 (Iowa App. 1992).

Having carefully studied the record, we conclude C.M.B. can not be returned safely to the custody of her biological parents. See Iowa Code § 232.2(6)(c)(2) and 232.2(6)(n) (1991). Proof by clear and convincing evidence that any one of the types of harm enumerated in section 232.2(6) exists at the time of the termination hearing is sufficient to support termination. In re A.M.S., 419 N.W.2d at 725.

While mental disability, standing alone, is not a sufficient reason for the termination of the parent-child relationship, it is a contributing factor to the inability to perform the duties of a parent. In re T.O., 470 N.W.2d 8, 11 (Iowa 1991).

> [The mother's] mental disability is a proper factor for this court to consider in determining whether these children have been, and will be, neglected to the point where their interest and welfare require termination. . . . Termination [is] appropriate when the disabled parent lacks the capacity to meet the child's present needs as well as the capacity to adapt to the child's future needs. Further, Iowa Code section 232.116(2)(a) states that in considering a termination of parental rights such consideration may include whether the parent's ability to provide for the child's needs is affected by the parent's mental capacity or mental condition.

Id. It cannot be seriously disputed that the mother's brain injury adversely affects her ability to properly care for C.M.B. to the extent that the child is imminently likely to suffer harmful effects if returned to the mother's care. Similarly, the evidence in the present case clearly establishes that the father has failed to mature to the point where he can be relied upon to provide for C.M.B.'s well-being. Accordingly, we hold the State has shown by clear and convincing evidence that termination of parental rights is in the best interest of C.M.B.

Next, we consider the questions of whether the district court properly granted the foster parents' petition to intervene and whether the district court properly transferred custody and guardianship of C.M.B. to the foster parents pursuant to Iowa Code section 232.118. We conclude that In re C.L.C., 479 N.W.2d 340 (Iowa App. 1991), is controlling on the issue of whether the foster parents' petition to intervene was properly granted.

In C.L.C., as in the present case, the couple wishing to adopt the children were granted intervention following termination of the biological parent's parental rights even though the couple was aware of the termination proceedings. The court of appeals held that the husband and wife who had developed a relationship with the children who were placed in a foster home prior to termination of parental rights of the natural parents were sufficiently "interested in the subject matter" of the juvenile

proceeding so as to have a right to intervene. In re C.L.C., 479 N.W.2d 340, 344 (Iowa App. 1991). In C.L.C., as here, the husband and wife had established a familial relationship with the children. Id. Relying on our legal discussion in C.L.C., we conclude the district court in the present case properly permitted the foster parents to intervene.

We also conclude the district court's transfer of custody and guardianship of C.M.B. from the aunt and uncle to the foster parents, pursuant to Iowa Code section 232.118, was in the child's best interests. The evidence presented at the hearing established, among other things, that C.M.B. has formed a parent/child relationship with the foster parents and that C.M.B. has formed a sibling relationship with the foster parents' other two children in the home. Accordingly, we affirm the district court's custody determination of C.M.B., placing the child with the foster parents.

We have considered the parties' remaining contentions on appeal and conclude the contentions are without merit. For the reasons stated in this opinion, we affirm the district court's judgment terminating the biological parents' parental rights to C.M.B. and placing custody of the child with the foster parents.

AFFIRMED.