

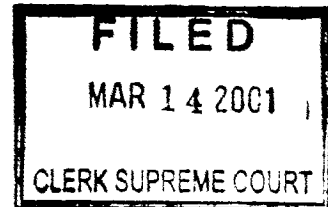
IN THE COURT OF APPEALS OF IOWA

No. 0-681 / 00-0666
Filed March 14, 2001

IN THE INTEREST OF
L.A.M. and D.D.M.,
Minor Children,

K.C., Grandmother,
Appellant,

S.M., Mother,
Appellant.



Appeal from the Iowa District Court for Polk County, Constance Cohen,
Associate Juvenile Judge.

Mother and grandmother appeal the juvenile court's order terminating
parental rights. **REVERSED AND REMANDED IN PART; APPEAL DISMISSED
IN PART.**

Tiffany Koenig, Des Moines, for appellant-mother.

Frank Burnette of Burnette & Kelley, Des Moines, for appellant-
grandmother.

Thomas J. Miller, Attorney General, Charles K. Phillips, Assistant Attorney
General, and Martha Johnson, Assistant County Attorney, for appellee-State.

Karen Taylor of Law Offices of Taylor & Ristau, Des Moines, guardian ad
litem for minor children.

Christopher Kragnes, Des Moines, for appellant-father.

Heard by Zimmer, P.J., and Hecht and Vaitheswaran, JJ.

HECHT, J.

Mother, grandmother, and father appeal the juvenile court's order terminating parental rights. The mother contends the juvenile court erred in finding clear and convincing evidence to terminate her parental rights under Iowa Code section 232.116(1)(g) (1999) and in finding termination of her rights was in the best interests of the children. The grandmother contends there is not clear and convincing evidence to support the trial court's findings regarding her fitness for custody of her grandchildren. The father's appeal was dismissed as untimely. We reverse and remand this matter to the juvenile court with respect to the mother's appeal and dismiss the grandmother's appeal.

I. Factual Background and Proceedings. Shonice is the mother of Daqurie, born on December 11, 1996, and Lastacia, born on June 22, 1998. The identity of Daqurie's father is unknown. Lastacia's father, Daniel, was not quite sixteen when she was born to Shonice, who was twenty-three at the time. Daniel and Shonice are no longer involved in an intimate relationship. While Daniel did contest termination of his rights at the trial in this matter, his notice of appeal was not filed in a timely manner, causing his appeal to be dismissed. His interests are therefore not at issue in this appeal.

Shonice is mentally challenged with an I.Q. of sixty-three. She is able to communicate well and works as a janitor at Camp Sunnyside. She requires assistance with managing her finances and paying her bills. Her children first came to the attention of the Department of Human Services ("DHS") in September of 1998 because Lastacia was not receiving adequate nutrition and

Shonice was not appropriately supervising both of the children. The State filed a petition alleging the children to be in need of assistance on September 17, 1998, and the juvenile court adjudicated them as such on October 22, 1998. On October 29, 1998, the court placed temporary legal custody of the children with Shonice's mother, Karen. At that time, Shonice and the children were living in an apartment with Karen.

DHS provided the family with a multitude of services from the beginning of this case, including assistance for Karen and Shonice in caring for the children who both have health issues and special needs, services to assist the children with health and developmental difficulties, and services to assist Shonice in coping with her mental disability. Karen and Shonice were generally compliant with the services offered, and made some progress. Caseworkers noted, however, Shonice often needed to be reminded to perform specific caretaking tasks for her children. In direct conflict with orders from the juvenile court and DHS, Karen left the children alone with Shonice at least twice for a short time.

On October 21, 1999, the State filed a motion requesting modification of the order placing legal custody with Karen and asking the court to remove the children from her care. Karen moved from the apartment she had been sharing with Shonice into another apartment in the same building. Daqurie and Lastacia moved with their grandmother, but because of the proximity of the two apartments, they continued to have significant daily contact with Shonice. The State filed a petition to terminate Shonice's rights on November 4, 1999. On November 5, 1999, Karen filed a petition to intervene, which the juvenile court

granted. A hearing on permanency and on the petition to terminate parental rights was held on January 14, 2000, and continued on February 17, 2000. Before the juvenile court issued its ruling on the termination issue, a DHS caseworker approached the court with information that on March 26, 2000, Karen left the children alone with Shonice for approximately three hours during the day. On March 27, 2000, the State filed another motion to modify the legal custody order and requested the court remove the children from Karen's care and place them in a foster home. On the same day, the juvenile court set a hearing in the matter for April 13, 2000, and removed Daqurie and Lastacia from their grandmother's care pending the hearing. The juvenile court filed the order terminating Shonice's parental rights with respect to her children on March 28, 2000.

At the hearing, the State withdrew its motion to modify, reasoning the issue was moot because the juvenile court had terminated Shonice's rights with respect to the children. Karen's attorney resisted, contending the grounds for removal of the children from her care were without merit and requested the juvenile court allow her a chance to present evidence on her own behalf. The juvenile court concluded it no longer had jurisdiction to consider the grandmother's claims and did not permit Karen's attorney to present evidence. Both Karen and Shonice filed timely notices of appeal.

II. Standard of Review. The standard of review in termination cases is *de novo*. *In re M.N.W.*, 577 N.W.2d 874, 875 (Iowa Ct. App. 1998). The grounds for termination must be proved by clear and convincing evidence. *In re E.K.*, 568

N.W.2d 829, 830 (Iowa Ct. App. 1997). Our primary concern is the best interests of the child; we look to both the child's long-range and immediate interests. *In re M.T.*, 613 N.W.2d 690, 691 (Iowa Ct. App. 2000).

III. Mother's Claims. Shonice challenges the juvenile court's termination of her parental rights with respect to Daqurie and Lastacia. The court terminated her rights pursuant to Iowa Code section 232.116(1)(g), which provides the court may terminate a parent's rights if it finds all of the following have occurred:

- (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 child has been removed from the physical custody of the child's parents 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.

Iowa Code § 232.116(1)(g). Shonice does not challenge the juvenile court's findings regarding the first two elements. She does, however, assert the State did not prove the third element by clear and convincing evidence. She claims the juvenile court erred by finding her children had been removed from her physical custody for six months of the last twelve months or for the last six consecutive months.

The State first claims Shonice failed to preserve the issue for our consideration on appeal. The juvenile court found the State met its burden of clear and convincing evidence on the third element regarding the amount of time the children had been out of their mother's physical custody. This is not a case in which the court failed to rule on an element of a claim and the appellant failed

to give the court an opportunity to do so. The parties litigated the issue and the district court made findings of fact pertaining to it. The goals of our error preservation rules were met. See *State v. Mann*, 602 N.W.2d 785, 790-91 (Iowa 1999). Therefore, we determine Shonice has preserved this issue for our review and we will consider the merits of her claim.

The children lived in the apartment with Shonice and Karen from October of 1998 until November of 1999. During this time, they were in Karen's legal custody. Shonice argues: (1) although the children were in Karen's *legal* custody, they were in Shonice's *physical* custody the entire time by virtue of the family's living arrangement and the nature and extent of their daily contacts, and (2) since the children were in Shonice's physical custody, the State has failed to prove the temporal element of its claim under Iowa Code section 232.116(1)(g)(3). The State contends the children were in Karen's custody – not Shonice's – by order of the juvenile court for the requisite period of time; and Shonice's contacts with the children did not rise to the level of "physical custody." It is undisputed *legal* custody of the children was placed with Karen from October 29, 1998, through March 27, 2000. The question before us, however, is whether the State proved by clear and convincing evidence the children were removed from Shonice's *physical* custody for the duration specified by the statute. "Physical custody" is not defined in Iowa Code chapter 232. Therefore, to decide this issue, we must first determine the meaning of the words "physical custody" in the applicable statute.

The primary goal in interpreting a statute is to ascertain the enacting body's intent. *State v. Casey's Gen. Stores, Inc.*, 587 N.W.2d 599, 601 (Iowa 1998). To determine legislative intent, we not only look to the language of the statute, but the objects sought to be accomplished, the purpose served, the underlying policies, the remedies, and the consequences of the various interpretations. *Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Mobil Oil Corp.*, 606 N.W.2d 359, 364 (Iowa 2000). Once we have determined the legislature's intent, we interpret the statute so as to give effect to the purpose underlying the legislation. *Top of Iowa Co-op v. Sime Farms, Inc.*, 608 N.W.2d 454, 460 (Iowa 2000). We will seek a reasonable interpretation which will best affect the purpose of the statute and avoid absurd results. *In re N.H.*, 383 N.W.2d 570, 572 (Iowa 1986); *In re M.L.W.*, 461 N.W.2d 609, 613 (Iowa Ct. App. 1990).

The legislature enunciated the purposes of chapter 232 by providing the chapter "shall be liberally construed to the end that each child under the jurisdiction of the court shall receive, preferably in the child's own home, the care, guidance, and control that will best serve the child's welfare and the best interest of the State." Iowa Code § 232.1; *In re N.M.*, 491 N.W.2d 153, 155 (Iowa 1992).

When statutes relate to the same subject matter or to closely allied subjects, they are said to be *in pari materia* and must be construed, considered, and examined in light of their common purpose and intent. *Farmers Co-op Co. v. DeKoster*, 528 N.W.2d 536, 538 (Iowa 1995). The legislature did provide a definition of "custodian" in chapter 232:

"Custodian" means a stepparent or a relative within the fourth degree of consanguinity to a child who has assumed responsibility for that child The rights and duties of a custodian with respect to a child are as follows:

- a. To maintain or transfer to another the physical possession of that child.
- b. To protect, train, and discipline that child.
- c. To provide food, clothing, housing, and medical care for that child.
- d. To consent to emergency medical care, including surgery.
- e. To sign a release of medical information to a health professional.

All rights and duties of a custodian shall be subject to any residual rights and duties remaining in a parent or guardian.

Iowa Code § 232.2(11). This definition includes rights and duties commonly held by one who has custody of children. See Black's Law Dictionary, 385 (6th ed. 1990) (defining "custody of children" as the care, control, and maintenance of a child).

In the Code chapter pertaining to dissolution of marriage and domestic relations, the legislature has defined "legal custody" as:

[A]n award of the rights of legal custody of a minor child to a parent under which a parent has legal custodial rights and responsibilities toward the child. Rights and responsibilities of legal custody include, but are not limited to, decision making affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction.

Iowa Code § 598.1(5). In the same chapter, "physical care" is defined as "the right and responsibility to maintain a home for the minor child and provide for the routine care of the child." See Iowa Code § 598.1(6). Although these definitions are not found in chapter 232, we believe they are instructive in our analysis of the issue before the court.

If the legislature had intended termination of parental rights under 232.116(1)(g)(3) to hinge upon removal of legal custody, it would have used the term "legal custody" in that section as it did in section 232.102(1). The legislature chose instead to specify termination is based upon the time during which a parent is dispossessed of "*physical custody*." We conclude the legislature clearly intended the concept of "physical custody" to be distinct from "legal custody." Our conclusion is buttressed by the principle statutes are not construed in such a way as to render words superfluous. *Vivian v. Madison*, 601 N.W.2d 872, 878 (Iowa 1999). We are guided by what the legislature actually said, rather than what it could or should have said. *Marcus v. Young*, 538 N.W.2d 285, 289 (Iowa 1995); *State v. Hatter*, 414 N.W.2d 333, 337 (Iowa 1987). We conclude the legislature's choice of the term "physical custody" in section 232.116(1)(g)(3) indicates an intent that, in order for the court to terminate parents' rights pursuant to the section, the child not merely be under the legal control of another person, but also under the physical control of a person or agency who is not the child's parent for the requisite period of time.

We conclude one who has physical custody under Iowa Code section 232.116(1)(g)(3) exercises physical possession, care, control, and responsibility over a child. A physical custodian performs regular caretaking duties while residing with the child including, but not limited to, those duties listed in sections 232.2(11)(a), (b), and (c). This definition of "physical custody" is consistent with the spirit of other language of section 232.116(1)(g)(3) allowing termination only if "any trial period in the home has been less than thirty days." We believe the

definition clearly comports with a policy determination made by the legislature that a parent's rights should not be terminated if he or she has lived with and provided substantial parental care for the child during the relevant statutory period.

We next consider whether the State met its burden to prove by clear and convincing evidence Shonice did not exercise physical custody over Daqurie and Lastacia during the time she lived with them. All parties agree Shonice maintained physical possession of the children while she was living with them, except when the children were in day care and she was at work. There is also evidence in the record tending to prove Shonice protected, trained, and disciplined her children during the time she lived with them. By most accounts, Shonice was generally compliant with the services offered to her, although she demonstrated difficulty with retaining information given to her by various service providers and applying that information to caretaking situations. Although she occasionally needed prompting to engage in appropriate discipline of her children, she responded well to direction and engaged in the recommended discipline and training methods. Shonice assumed responsibility for feeding and bathing the children, getting them ready for day care in the morning, and picking them up from day care in the afternoon during the relevant time period. She learned how to make nutritious meals for the children and demonstrated her ability to appropriately feed them. The record indicates she took care of their health needs under some supervision from DHS and her mother. Shonice also took her children to church with her on Sundays, and a friend from church

testified the children were always clean, well dressed, and disciplined appropriately when needed. However, the record clearly and convincingly establishes Shonice performed significant and substantial parenting tasks for her children with help and direction from both her mother and service providers during the time she lived with the children. She was not merely in the presence of her children while she lived with them; she was responsible, to a significant degree, for their care and control.

The statutory time period specified in 232.116(1)(g)(3) begins to run on the date custody is transferred and continues to run until the date of the termination hearing. See *In re A.M.S.*, 419 N.W.2d 723, 725 (Iowa 1988). The record is clear the children lived with Shonice until November of 1999, when Karen moved out of the apartment with the children. The termination hearing began on January 14, 2000, only two and one-half months after the children moved out of Shonice's dwelling. We therefore conclude the juvenile court erred by finding the State proved by clear and convincing evidence Shonice did not have physical custody for the minimum period required to support the termination of her parental rights under section 232.116(1)(g). We are aware of the time it has taken this case to work its way through the appellate process and are also aware the circumstances in which these children live may not be the same as when the juvenile court entered the termination order. We therefore reverse the termination of Shonice's parental rights and remand this case to the juvenile court to proceed in accordance with this opinion and in the best interests of Daqurie and Lastacia. We do not consider Shonice's arguments regarding

section 232.116(1)(g)(4) because our determination of the above issue is dispositive of the appeal.

IV. Grandmother's Claims. Karen argues there is not clear and convincing evidence to support the juvenile court's findings affecting her ability to be considered as an adoptive placement for her grandchildren. She appealed the order terminating her daughter's parental rights in order to challenge certain findings of fact she believes would negatively impact her ability to adopt her grandchildren. We have reversed the order terminating Shonice's parental rights and therefore, Karen's interest in an adoption is moot at this time. Accordingly, Karen's appeal is dismissed.

REVERSED AND REMANDED IN PART; APPEAL DISMISSED IN PART.

Vaitheswaran, J., concurs; Zimmer, P.J., dissents.

ZIMMER, P.J. (dissenting)

I respectfully dissent.

Simply put, I do not believe a parent who has access to a child and assists with his or her physical care necessarily has "physical custody" so as to defeat the time requisites of the third element of Iowa Code section 232.116(1)(g)(3). On this record, I conclude the juvenile court properly found Shonice's children had been removed from her physical custody for six months of the last twelve months or for the last six consecutive months.

I would affirm the juvenile court's order terminating Shonice's parental rights.