IN THE COURT OF APPEALS OF IOWA

FILED
JUN 15 1989
CLERK SUPREME COURT

IN THE INTEREST OF R.F.M., Jr., C.R.M., E.S.M., and F.A.M., Minor Children,	)	
D.M., Mother,	)	9-90 / 88-1618 117
Appellant.	)	

Appeal from the Iowa District Court for Scott County (No J(T)5614-0886), John Mullen, District Associate Judge.

The mother of four children appeals the juvenile court order terminating her parental rights. **AFFIRMED.**

Gary D. McKenrick of Gomez, May, McKenrick & Kelly, Davenport, for appellant mother.

Janice Hanrahan-Roemer, Davenport, guardian ad litem, for the children.

Thomas J. Miller, Attorney General; Kathrine S. Miller-Todd, Assistant Attorney General; and James Ottesen, Assistant County Attorney, for appellee State.

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

HABHAB, J. 118

D.M., mother of R.F.M., Jr., C.R.M., E.S.M., and F.A.M., appeals the decision of the juvenile court terminating her parental rights. She contends the court 1) failed to compel her requests for discovery; 2) erred in prohibiting the testimony of her children; and 3) clear and convincing evidence did not establish that the children cannot be returned to their mother's custody. We disagree and affirm the decision of the juvenile court.

Appellate review of termination proceedings is de novo. In re D.G., 349 N.W.2d 487, 491 (Iowa 1984). 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.

I. D.M. contends the State failed to establish by clear and convincing evidence that the children cannot be returned to their mother's custody. We disagree. All of D.M 's children were adjudicated in need of assistance pursuant to Iowa Code sections 232.2(6)(B), 232.2(6)(c)(2), and 232.2(6)(g). The children had been physically abused and neglected by D.M. or by others with her knowledge. They had been locked in their bedrooms for prolonged periods of time, and were found in this circumstance only after one of the boys walked to the police station and informed the police of their predicament. The children

were denied food and access to bathroom facilities when discovered by the authorities. The room in which the children were kept was smeared with feces and the odor unbearable. It contained only a metal-frame bunk bed with bare mattresses, a broken dresser, and a few broken toys. The mother's bedroom, to the contrary, was well kept and amply furnished.

Subsequent to the adjudication and removal from the home, all children have exhibited behavioral problems and disorders. E.M. reported she was sexually abused by the son of her mother's roommate. She stated he had had intercourse with her. The report was substantiated and sexual abuse in the second degree was determined to have occurred.[1] There were some statements that all the children had behaved inappropriately sexually. D.M. stated that she was aware of the abuse. In addition, C.M. was found to have sexually abused his foster-sibling during the summer of 1988.

There is clear and convincing evidence to support the fact that although D.M. has complied with some aspects of her case plan, she is still unable to emotionally attend the needs of her children consistently. All therapists and departmental staff recommended termination with the

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1. E.M.'s therapist related that the living conditions in the home were more devastating to E.M. than the incidences of sexual abuse.

exception of Dr. McEchron. He stated reunification may only be possible over a lengthy period of time.

These children should not be forced to endlessly await the maturity of their mother. In Interest of T.D.C., 336 N.W.2d 738, 744 (Iowa 1983). Termination must occur if twelve to eighteen months have elapsed since the child was removed from the home and the parent still cannot take care of the child. Id. Evidence of the parent's past performance may be indicative of the quality of future care he or she is capable of providing. In the Interest of Dameron, 306 N.W.2d 743, 745 (Iowa 1981).

After D.M. dropped out of therapy, her relationship with her children deteriorated. Consequently, the children's behavior deteriorated. They again became fearful to the point of paranoia that their mother would harm or even kill them. Witnesses reported that D.M. continued to rebuff the children's overtures towards her, ignoring E.M. and scapegoating C.M. One caseworker testified:

> [C.M.] began to run away again, he was becoming extremely aggressive with the foster siblings -- hold on a minute. He began to hoard food again, he committed sexual abuse on one of his foster sisters. [E.M.] became more controlling, more bossy, she was always in trouble at her foster home. She began to hide a lot, sleeplessness at nights. [F.M.] began to urinate and defecate in inappropriate places. He was becoming very active and aggressive. He was also doing a lot of lying. [R.M.] had become very worrisome. Lot of anxiety. Really quiet after the visits. Didn't want to talk about them.

Finally, it was reported that D.M. had allowed the children in her presence to dive headfirst into a one and a half foot deep wading pool, thus placing them in physical jeopardy. She was not aware of the probable harm that could result. A caseworker intervened.

We affirm the trial court on this issue.

II. D.M. argues the juvenile court denied her due process of the law by failing to compel the State's answers to interrogatories she had propounded. The court stated from the bench that she had not been denied due process because all information she requested was available to her informally. In support of the court's decision, Rule of Juvenile Procedure 1.3 states that informal methods of discovery are preferred over those enumerated in the Rules of Civil Procedure.

The juvenile court noted that all attorneys are encouraged to attend departmental staff meetings concerning the affected child, that they have full access to departmental personnel, and that all reports are made available to the respective parties. The court further stated it would enforce any subpoenas duces tecum D.M. requested. Several were subsequently issued; with only three was there compliance. D.M. did not petition the court for enforcement. She cannot now complain regarding that issue. Further, at the termination hearing, her attorney stated no prejudice resulted. We find no

prejudice for the same evidence requested was made available from other sources.

III. D.M. next argues she was denied due process when the juvenile court prohibited the testimony of her three oldest children. We glean from the record that the sole purpose of this testimony was to establish their preferences. The mother desired the children to be called as witnesses in this respect; the father did not intend to call them.

The court disallowed the children's testimony because it found requiring the children to testify not to be in their best interests. Such is the primary consideration of these proceedings. In the Interest of J.S., 427 N.W.2d 162, 163 (Iowa 1988). The court received evidence regarding the delicate emotional state of the children. D.M. argues the court, at least, should have inquired as to the competency of the children. However, she failed to preserve error. No objection was made regarding this issue.

D.M., through her attorney, argued that because the children previously had discussed their relationship with numerous therapists and departmental personnel, testimony given in court should not impose an additional burden. We disagree. The trial court is in the best position to make this type of decision, and from our review of the record, we find no error.

There is substantial evidence to support the court's rationale. Regardless of what the children may or may not have testified to, their best interests are determinate. See In Interest of J.P.B., 419 N.W.2d 387, 391 (Iowa 1988). But we do believe the trial court committed error in not permitting the offer of proof at least as to the child in excess of ten years of age. From our review of the record, there is every indication that this child was fearful of his mother. Even if he contradicted earlier statements, the evidence is so clear and convincing in favor of termination we cannot see how D.M. was prejudiced. The evidence is overwhelming that the children are afraid of their mother and have a fear of being returned to her. Whether a child should be permitted to testify in termination proceedings must be judged on a case-by-case basis.

We, therefore, affirm the decision of the juvenile court in all regards.

AFFIRMED.