FILED
AUG 30 1990
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-483 / 90-475

IN THE INTEREST OF J.H. and E.H., Minor Children.

J.H., Mother,

Appellant.

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Appeal from the Iowa District Court for Wapello County, Gene Glenn, Juvenile Referee.

The mother appeals the decision of the juvenile court terminating her parental right to her two children. **AFFIRMED.**

Allen A. Anderson of Spayde, White & Anderson, Oskaloosa, for appellant mother.

Thomas J. Miller, Attorney General; Gordon E. Allen, Deputy Attorney General; and Kathrine S. Miller-Todd, Assistant Attorney General, for appellee State.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

This case involves two children, a girl born in October 1983 and a boy born in March 1985. Their parents have never been married to each other but did live together for several years. The family also includes the mother's older daughter from a prior relationship.

The father physically abused the mother on numerous occasions. He also physically abused the older half-sister[1] and was suspected of sexually abusing the half-sister as well. Both parents had serious drug-abuse problems, and the father has a criminal record for various theft-related offenses. The parents failed to maintain employment or a stable residence and often lived in profound filth..

In April 1987 all three children were adjudicated to be children in need of assistance. In May 1987 two children were placed in foster care, where they have since

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1. Although the appellant's older daughter, M.H., is not a party to the termination proceedings, the record reveals that appellant's live-in boyfriend, D.B., the father of E.H. and J.H., struck M.H. in the eye with a "forceful blow." M.H. was also "corrected" by D.B. by means of striking M.H. on the bare buttocks and legs with a belt or his bare hands. M.H.'s aunt stated that D.B. "hit her [M.H.] with all his might, as many as six times." The appellant-mother knew of this treatment by D.B., but failed to protect M.H. from him.

remained.[2] (The older half-sister was placed in the home of the maternal grandmother.)

During the children's foster care the mother was involved with a new boyfriend, whom she eventually married. This man, like the children's father, physically abused the mother on a regular basis. Also during the children's foster care, the mother was convicted of forgery and was initially placed on probation. However, after a second forgery charge and a failure to seek drug therapy, the mother's probation was revoked; she is incarcerated at the present time.

In June 1989 the State filed a petition to terminate the parental rights of both parents with respect to the two children involved here. After a hearing, the juvenile court terminated the parental rights of both parents. The juvenile court relied on Iowa Code section 232.116(1)(e), which permits termination if a child is at least four years old, has been adjudicated CINA, has been in foster care for twelve of the last eighteen months, and cannot safely be returned to the parent's home.

The mother has appealed from the termination order. The father has not appealed. We affirm.

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2. There is evidence that D.B. gave E.H. a "tattoo" on her buttocks when she was about eighteen months old. "He wrapped sewing thread soaked in India ink around a sewing needle, then pierced the skin with the needle point, allowing the ink to collect under the surface of the skin."

The mother challenges the sufficiency of the evidence to prove the children cannot safely be returned to her care at some time in the future. She alleges she has recently made progress in overcoming her deficiencies. She also asserts the children could be placed with her own mother (the children's maternal grandmother) until she is released from prison and is otherwise able to resume custody. In the alternative, even if termination is warranted, the mother contends the juvenile court erred by refusing to place the children with their maternal grandmother. Finally, the mother contends the juvenile referee erred by first recusing himself and then reinstating himself as the presiding judge. This issue arose as follows: On August 23, 1989, the Iowa Court of Appeals rendered a decision suggesting that a juvenile judge with substantial prior involvement in CINA proceedings should not preside over a termination-of-parental-rights case involving the same children. On August 25 the referee, acting in reliance on the court of appeals opinion, recused himself because of his prior involvement in the case. However, in November 1989 the Iowa Supreme Court reversed the court of appeals' ruling on the general issue of recusal. Accordingly, later in November the referee withdrew his recusal and reinstated himself as the presiding judge. The mother argues that this reinstatement was erroneous; she asserts the initial recusal should be presumed valid, that there was good cause for the initial recusal, and that the

good cause did not disappear simply because of the November 1989 supreme court opinion. For the reasons hereafter stated, we disagree.

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.

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 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).

The State has the burden to prove the allegations of the petition to terminate by clear and convincing evidence. In the Interest of D.T., 418 N.W.2d 355, 356 (Iowa App. 1987).

The first issue in dispute involves whether there is clear and convincing evidence that J.H. and E.H. cannot be returned to their mother's custody, as provided in Iowa Code section 232.2(6) (1989). That section provides in pertinent part that:

> 6. "Child in need of assistance" means an unmarried child:
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> b. Whose parent . . . has physically abused or neglected the child, or is imminently likely to abuse or neglect the child.
>
> c. Who has suffered or is imminently likely to suffer harmful effects as a result of:
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> * * *
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> (2) The failure of the child's parent . . . to exercise a reasonable degree of care in supervising the child.

Upon thorough review of the record, we find there is clear and convincing evidence the children would be in imminent threat of harm from either neglect or a lack of reasonable supervision. The children have been out of their mother's home for approximately twenty-two months. During this period of time the mother has made no visible progress towards straightening out her life. E.H. and J.H. should not be forced to endlessly suffer the parentless limbo of foster care. Long v. Long, 255 N.W.2d 140,146 (Iowa 1977). And further, they need not endlessly await the maturity of their natural parent. In the Interest of T.D.C., 336 N.W.2d 609, 614 (Iowa 1987).

The record reveals the mother has a serious drug dependency problem, and has been unable to successfully complete a drug dependency program. At the termination hearing on August 1, 1989 the mother's social worker testified that although the mother had completed her twenty-eight-day inpatient stay at the treatment center she

failed to follow through with recommended intensive treatment and to attend the outpatient part of the program.

The mother asserts she completed many aspects of her case plan after her inpatient treatment in the fall of 1987. The record reveals she progressed enough to receive unsupervised and more frequent home visits with the children. However, beginning in September of 1988, the home situation deteriorated and she again became involved with drugs. It was at this time that domestic violence became severe and she was arrested for two counts of forgery. She married R.R. who was abusing her and lost the extensive visitation rights that she had gained. In addition, the mother lost her probation rights when she failed to receive inpatient treatment for her substance abuse and is currently serving a prison term.

This mother has been given numerous opportunities to provide a stable home environment for her children and show the court that she is serious about treating her drug problem. In the twenty-two months that the children have been in foster care she has been unable to make progress towards solving either problem. And, her cooperation with the services provided have been sporadic. Our primary concern is the child's long-term, as well as immediate, best interests. In re Dameron, 306 N.W.2d 743, 745 (Iowa 1981). We conclude that it would be in J.H. and E.H.'s best interest to affirm the decision of the juvenile court terminating the mother's parental rights.

The second issue on appeal is whether the juvenile court was correct in concluding that the children should not be placed with their maternal grandmother after the termination of their mother's parental rights. We find that it would not be in the children's best interest to be placed with their maternal grandmother.

We arrived at this decision after an extensive review of the record. The record indicates many concerns about the grandmother's ability to care for the children. The grandmother's health is poor. She has emphysema and requires oxygen. In addition, she has diabetes and requires an insulin shot a day. The record indicates that the grandmother spends a great deal of time in bed and rarely leaves the home.

Both children are young and require supervision. J.H. in particular has had behavioral problems and greater supervision is necessary in his case. The grandmother, in her testimony, stated that she would be relying on the help of her thirteen-year-old granddaughter and her twenty-three-year-old son to aid in the care of the children. This presents a problem for in a few years these children may move from the home and the grandmother would be the only person to care for the children. Although this court recognizes that the grandmother does love and care a great deal for the children, we find that it would be in the children's best interest to not be placed in the custody of their maternal grandmother.

The final issue raised by the mother involves the reinstatement of the juvenile court judge after he had recused himself. The mother contends there was good cause for the recusal order and the presiding judge erred by reinstating himself. We find no error on the part of the judge .

The judge recused himself after this court's decision in In the Interest of J.M and K.M., Minor Children, No. 9-307/89-531 filed on August 23, 1989. He then reinstated himself based on the supreme court's decision of November 3, 1989, rejecting this court's suggestion. In the Interest of J.M. & K.M., filed November 3, 1989. There was no evidence presented by the mother to indicate that the initial recusal was based on anything other than the decisions of the appellate court.

When recusal of a judge is sought, it is necessary for the defendant to establish prejudice with allegations of fact. State v. Smith, 282 N.W.2d 138, 142 (Iowa 1979). The trial court's decision will not be overturned unless there has been an abuse of discretion. Id. at 142.

We are unable to find any allegations of fact that establish prejudice. The judge recused himself following the ruling of this court that it would be improper for the same judge to preside over a CINA adjudication and a subsequent termination proceeding. In the Interest of J.M., S. Ct. No. 9-307/89-531, filed August 23, 1989. He reinstated himself when the supreme court determined that

such proceedings are interdependent and provide continuity in the judicial resolution of the child's status. In the Interest of J.M., S. Ct. No. 89-531, filed November 3, 1989. We find no abuse of discretion.

AFFIRMED.

Hayden, P.J., concurs; Sackett, J., specially concurs without opinion.