

IN THE COURT OF APPEALS OF IOWA

No. 1-197 / 91-45

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CLERK SUPREME COURT

IN THE INTEREST OF M.L.O., D.O., and D.O., Children,
C.O., Mother,
Appellant.

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Appeal from the Iowa District Court for Scott County,
John G. Mullen, District Associate Judge.

The mother of three children appeals the termination of
her parental rights. **AFFIRMED IN PART; REVERSED AND
REMANDED IN PART.**

Cynthia Z. Taylor of Dwyer, Wing, Zamora, Taylor &
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Considered by Donielson, P.J., and Schlegel and Hayden,
JJ.

SCHLEGEL, J.

C.O., the mother of M.L.O., D.O., and D.O., appeals the termination of her parental relationship with her three minor children. Because we find the evidence in this case does not show clearly and convincingly that the children are likely to suffer neglect, we reverse the order terminating the parent-child relationship and remand with instructions.

I. C.O. has been involved with the Department of Human Services (DHS) for many years. Indeed, she is a product of the system in which she was first placed at the age of six years, when she entered foster care because of a neglectful, alcoholic mother. C.O. spent her formative years either in foster or group homes. As she states, "I was placed in a home in Des Moines until I was fourteen, and then I was on the streets." She dropped out of school after the tenth grade, and at age 16, she returned to her mother.

From about age fourteen, C.O. has suffered a serious heart arrhythmia, which causes her heart to pump blood at a improper rate. When this condition is acute, it disables her and frequently causes dizziness and fainting. The condition has caused her numerous hospitalizations. She has been unable to maintain gainful employment and receives Social Security disability benefits. In 1988, during one of the acute episodes relating to her heart, she was very close to death. Following that incident and following two

or more additional hospitalizations, her doctor warned her either that she have surgery for the condition or that she would surely be dead within five years. She apparently has a strong fear of death, and for quite a while, resisted surgery on that basis. As a result of the doctor's warning, C.O. underwent a surgical procedure which, while not totally successful, has improved her condition substantially. According to the doctor's testimony, a normal heart expels approximately fifty percent of the blood from its chambers at any given time. The doctor further testified that C.O.'s heart has improved from expelling nine percent to expelling approximately thirty-two percent of the blood from its chambers. Further surgery and the implantation of a pacemaker are expected to correct her heart so that it will have a normal function.

C.O. is the mother of three little boys, M.L.O., D.O. (hereafter De.O.), and D.O. They have a mother who obviously loves them very much. When she is able to have the children with her, she is a good, caring and attentive mother. She does a fine job of occupying their time with interesting activities. She keeps them clean, well fed, and generally well cared for.

In 1988 M.L.O. was sexually abused by C.O.'s paramour. C.O. promptly reported the incident to the police, and the perpetrator was convicted and sentenced to prison. From the record, except when they are out of her care, C.O. has been very protective of them.

DHS and various other services assisted C.O. a great deal until about March 3, 1989. The only thing that C.O. did at that time to incur the displeasure of the workers was to become ill from her defective heart. She neglected to take her medication, which may have contributed to her problem. There is testimony in this record that the side effects of that medication are quite severe and that there are occasions that the nausea created by the medication causes her to be unable to keep the medication down when she takes it. In short, according to the testimony of her doctor, there are motivations for not taking the medication, especially if she feels she does not need it. From that time on, however, the caring and concerned help that she had been receiving was not so evident as it had been.

A few other features seem to stand out in this case. First, C.O. ingested cocaine a short time before she gave birth to D.O. This led to a suspicion of drug abuse. There is no other evidence of such abuse. The evidence is all to the effect that her cocaine use was a one-time incident. No one contends that she has a problem with alcohol. Her evaluation showed that she did not have a problem with the abuse of any drug, including alcohol. This event, however, rightly caused a great deal of concern and prompted treatment and educational sessions on the hazards of the use of drugs or alcohol.

A second feature of this case that has affected it a great deal seems to be an incident that occurred on May 3, 1989. When C.O. was scheduled for a visit with D.O., C.O. could not be found. C.O. had left the other two children in the care of a neighbor who had access to C.O.'s apartment. Efforts to contact C.O. failed, and the two remaining children were placed in foster care. They remained in foster care from that day on. C.O. claimed that she made arrangements for her neighbor to baby-sit her children overnight. The record does not clearly show what caused this absence, her failure to either carry out the visit with D.O., or her failure to notify anyone that she would be unavailable.

A third feature of this case is that upon the removal of M.L.O. and De.O. to foster care, financial assistance, through Aid to Dependent Children was stopped. C.O., because of her heart condition, was unable to work. She was therefore without support. She was forced to rely upon others for a place to live, food, and clothing. This situation persisted for an extended time, during which time, a social worker observed that she led a transient life style. C.O. has obtained Social Security disability benefits, however, and now has acquired proper living quarters.

It is perhaps ironic that at the time of the hearing on the petition to terminate the parental relationship between C.O. and her three boys, she may be in the best physical

condition that she has enjoyed since her first child was born. It is perhaps also ironic that while she is in better health than before, the improvement happened after the various social services personnel had apparently decided that there was no hope that she could become a proper custodian for her children. To be sure, the DHS and its workers in various capacities had expended a great deal of energy and services to assist C.O. She had been variously described as cooperative with the workers, anxious to learn parenting, clean and neat with the children, and attentive to the needs of the children.

The juvenile court ordered the parent-child relationship between M.L.O., De.O., and D.O., and their mother, C.O. to be terminated. The court relied on grounds set out in Iowa Code section 232.116(1)(e) for termination of her relationship with M.L.O. The court relied on grounds set out in Iowa Code section 232.116(1)(g) for termination of her relationship with De.O. and D.O. The court also ordered the parent-child relationship between M.L.O. and his father, L.O., and the relationship between De.O. and D.O., and their father, L.O., and their putative father, G.T., be terminated. Only C.O. has appealed.

Our review of this termination proceeding is de novo. In re W.G., 349 N.W.2d 487, 491 (Iowa 1984), cert. denied, 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. Iowa R. App. P. 14(f)(7); W.G., 349 N.W.2d 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). There is a rebuttable presumption that the best interest of a child is served when custody is with the natural parents. In re Chad, 318 N.W.2d 213, 218 (Iowa 1982).

C.O. claims that there was not clear and convincing evidence that grounds for termination under sections 232.116(1)(e) and 232.116(1)(g) existed. She further claims that the court erred in terminating parental rights due to the mother's disability.

II. The trial court terminated the parent-child relationship between M.L.O. and C.O. under the provisions of Iowa Code section 232.116(1)(e). That section permits termination of rights if:

The court finds that all of the following have occurred:

- (1) The child is four years of age or older.
- (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 twelve of the last eighteen months, or for the last twelve consecutive months and any trial period at home has been less than thirty days.
- (4) There is clear and convincing evidence that at the present time the child cannot be returned to the custody of the child's parents as provided in section 232.102.

The trial court terminated the parent-child relationship between De.O. and D.O. and their mother C.O., under the provisions of Iowa Code section 232.116(1)(g). That section permits termination if:

The court finds that 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 custody of the child has been transferred from the child's parents for placement 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.

Section 232.102(4) provides that:

Whenever possible the court should permit the child to remain at home with the child's parent, guardian or custodian. Custody of the child should not be transferred unless the court finds there is clear and convincing evidence that:

a. The child cannot be protected from physical abuse without transfer of custody; or

b. The child cannot be protected from some harm which would justify the adjudication of the child as a child in need of assistance and an adequate placement is available.

The order shall, in addition, contain a statement that removal from the home is the result of a determination that continuation therein would be contrary to the welfare of the child, and that reasonable efforts have been made to prevent or eliminate the need for removal of the child from the child's home.

There must be clear and convincing evidence that the children are likely to suffer the harms referred to in section 232.102. In re Chad, 318 N.W.2d 213, 219 (Iowa 1982). To find what harm would be that which would justify the adjudication of these children as children in need of assistance, we must look to Iowa Code section 232.2(6), which defines "child in need of assistance." The juvenile

court stated that "[t]here is a serious and fundamental lack of parenting ability or commitment to her children." The court also rested its finding that the children were in need of assistance on the possibility of harms described in section 232.2(6)(c)(2), which defines a child in need of assistance as one:

c. Who has suffered or is imminently likely to suffer harmful effects as a result of either of the following:

(1) . . .

(2) The failure of the child's parent . . . to exercise a reasonable degree of care in supervising the child.

The juvenile court's reference to "lack of parenting might also include the provisions of section 232.2(6)(g), which would include a child:

Whose parent . . . fails to exercise a minimal degree of care in supplying the child with adequate food, clothing or shelter and refuses other means made available to provide such essentials.

The court found that C.O. did not complete a parenting class; that she moved so much that DHS could not find her; that when she moved to Illinois, the service was no longer available to her. It found that C.O. "has not significantly progressed according to the case plan, and that after more than three years of intervention, she has no better capabilities of parenting these children or even understanding these children's needs and problems." Finally, the court found that "the risk of further sexual abuse, or neglect is high due to the fact that this parent recognizes neither the need for change nor is she motivated to change.

We note that there is no evidence to support a finding that there is a risk of "further sexual abuse". The record contains the one incident of sexual abuse of M.L.O. As stated above, this was promptly reported, and the perpetrator was convicted.

In this case we have the sad situation of a parent who suffers from a serious heart condition, because of which, these children have had a relatively unstable life. For whatever reason, C.O. has periods when she does not take the medication prescribed by the doctor to control the arrhythmia that has plagued her since she was fourteen years of age.

This is a difficult case. For a considerable length of time, two of the children were placed in C.O.'s care, and the youngest child was a frequent overnight visitor. Under date of March 1, 1989, a caseworker wrote:

Throughout my involvement [C.O.] has stated that she wants to parent all 3 of her children. She currently has [M.L.O.] and [De.O.] residing with her and with assistance from Visiting Nurse, Homemakers, DHS and myself, has been able to maintain them in her home. I do worry though that if [D.O.] is returned to her at this time, especially if the court is still expecting her to complete a substance abuse program, that the placement of all 3 children may fail. I am not fearful that [C.O.] would physically abuse the children, but rather that she would become overwhelmed by trying to go through an intensive, month long substance abuse program AND parenting 3 small children AND getting the children to day care AND staying involved with Homemakers and Visiting Nurses, Parents United, etc. Doing all of those activities would be almost overwhelming for anybody. [C.O.] wants to be a good parent and has tried extremely hard these past 3 months to succeed at it.

(Emphasis added.)

Under date of March 26, 1989, a DHS social worker wrote:

The family does continue to make progress, but given [C.O.'s] poor health and her frequent hospitalizations, progress has been slow. She still continues to cooperate readily with all of the services provided to her and her providers state that she is willing to work on those issues that they discuss with her. This worker believes that services for this family will be successful, but state that services will be long-term, given the need level in this family.

By a letter report to the juvenile court dated March 28, 1989, a social worker who had been involved with the O. family for less than a month beginning when C.O. again fell ill, pointed out several things that had not "been completed." At this time, it seems that the findings of some of the case workers were different. The patience with C.O. seemed to become more strained. It appears that the principal purpose of providing services to C.O.--that of keeping the children in the home of their parent--became less a purpose than before and since May 1989 C.O. has had no in-home visitation, and there has been no effort to return the children to her.

C.O. also contends that the court terminated her parental rights due to her disability. The State counters that it is not due to her disability, but her failure to follow the case plan and to take her medication responsibly so that she could adequately parent the children.

Although neglect by reason of a disability may well deprive children of needed care, and is not, as a matter of law, an excuse to avoid termination of parental rights, we conclude that each case must be examined on its own facts. In this case, because of the outlook for improvement in her condition, the decision should be made on the basis of C.O.'s demonstration of responsible parenting at times when she is free of her condition. We recognize, as in In re K.F., 437 N.W.2d 559 (Iowa 1989), the disability may be of such severity that the child can have no stable home and care.

It is well known by the various workers who have been involved with this case that C.O. has no family support system to help her when she is ill or has a desire to be absent from the home for any extended period of time. The record does not demonstrate that the absence from the home on May 3, 1989, was for any improper purpose. There is a dispute between C.O. and the petitioner's witnesses as to how long she was away and whether she was responding properly to their concern. There is no indication that DHS or any workers counseled with C.O. following that absence, either to determine why she was absent or whether this was conduct which they had reason to fear might be repeated. The juvenile court rather insensitively suggests that C.O.'s reasons for her absence and her explanation that she has now adopted a different attitude about her health problems is just "the same old song and dance."

C.O.'s condition required her to take medication which the doctor described as having very powerful and difficult side effects. Even so, she cooperated with the workers to improve her ability to parent her children and followed through with many of the directives in the case plan.

The root of C.O.'s problems has always been the serious condition of her heart. That problem has been improved and the outlook for improvement to normalcy is good. See In re T.O., No. 137/90-1004, slip op. at 11 (Iowa May 15, 1991). With a normal functioning heart and careful assistance by the various services which are available, C.O. should be able to parent her children. There is not clear and convincing evidence that if the children were returned to her with appropriate assistance that they are likely to suffer harms as set out in the statutes quoted above.

The various workers and the department accepted the fact that there would be a long-term need for assistance. With a healthy mother who loves her children and wants to parent them; who keeps them clean, well clothed and fed when they are with her; and with the services that are available to help her; it is not a sufficient answer at this time to terminate the parent-child relationship.

We reverse this termination and remand this matter to the juvenile court for an early return of the children to C.O. The juvenile court shall order such assistance to her as is needed to help her provide for and protect the children.

From our de novo review, we find there is not evidence to support a finding that C.O. has any problem with alcohol or drugs, or that there is any likelihood that the children may suffer further sexual abuse. There is no evidence to support a finding that returning these children to their mother is likely to subject them to physical abuse. With appropriate help and services, there is little likelihood that the children will suffer neglect.

We do not disturb the juvenile court's order terminating the parent-child relationships with the fathers.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Hayden, J., concurs; Donielson, P.J., dissents.

DONIELSON, P.J. (dissenting)

I respectfully dissent. I would like to share the majority's optimism about C.O., but my review of the record compels me to reach an opposite conclusion. Based on C.O.'s history of noncompliance with her own medical needs and lack of follow-through with offered services, I am not able to state the need for the children's continued child-in-need-of-assistance status will be extinguished in the near future. I believe the record before this court provides clear and convincing evidence that if C.O.'s children would be returned to her they would suffer harmful effects as a result of neglect or lack of supervision.

The Iowa Supreme Court faced an analogous factual setting in In re K.F., 437 N.W.2d 559 (Iowa 1989). That case involved an appeal from a juvenile court judgment severing a mother-child relationship where the mother suffered from schizophrenia, paranoid subtype. The mother had been subjected to several involuntary commitments due to her discontinuation of drugs necessary to control her condition. The numerous commitments of the mother resulted in the repeated foster care placement of her child. In the case before us, the mother's failure to take necessary medication has resulted in repeated hospitalizations for the mother and repeated foster care placements for the children.

In In re K.F., the supreme court noted that "mental disability, standing alone, is not sufficient for the

termination of the parent-child relationship." Id. at 560 (citing In re O'Neal, 303 N.W.2d 414, 422 (Iowa 1981)). Similarly, physical disability, standing alone, is not sufficient for the termination of the parent-child relationship. However, where the mother's past performance indicates the likelihood of repeated episodes of failure to take needed medications and subsequent hospitalizations, the supreme court found termination of parental rights the only viable means of giving the child in question some sense of stability and permanency. In re K.F., 437 N.W.2d at 564.

Here, no intervention up to this point has altered C.O.'s repetition of a cycle of hospitalization for a heart condition, medical stabilization, release from the hospital, failure to take medicines, and hospitalization. C.O.'s recent surgery has not eliminated her need for regular medications. C.O. has also failed to attend critical post-operative appointments with her physician, which is consistent with her irresponsibility in relation to her health. C.O. has also been irresponsible concerning other necessities. For example, after C.O. was ineligible for Aid to Dependent Children financial assistance, C.O. was offered, but failed to follow through with, services which would have provided financial and housing assistance.

The O. children have already spent a substantial portion of their lives in foster care. These children need to be allowed to develop a sense of stability and

permanency. I would affirm the termination of the mother-child relationship.