IN THE COURT OF APPEALS OF IOWA

No. 5-068 / 94-1468

FILED
APR 28 1995
CLERK SUPREME COURT

IN THE INTEREST OF M.E.J. and M.K.J., Minor Children,

B.G.J., Natural Father,

Appellant.

Appeal from the Iowa District Court for Woodbury County, Mary L. McCollum Timko, Judge.

The father appeals from the termination of his parental rights to his two minor children. **AFFIRMED.**

Thomas M. Walter of Johnson, Hester & Walter, Ottumwa, for appellant.

Thomas J. Miller, Attorney General, Gordon E. Allen, Deputy Attorney General, Judy Sheirbon, Assistant Attorney General, and Marleen Loftus, Assistant County Attorney, for appellee.

John C. Polifka, Sioux City, guardian ad litem for minor children.

Heard by Sackett, P.J., and Cady and Huitink, JJ.

CADY, J.

We are confronted in this appeal with the question whether sufficient evidence exists to justify the termination of a parent-child relationship. On our careful de novo review of the particular facts and circumstances of this case, we conclude the trial court properly terminated the father's parental rights.

Bryan J., Sr., and Leona B. were married in 1984. They lived together prior to their marriage. They had three children. Bryan, Jr., was born February 25, 1985. Miley was born June 21, 1986. Myrtle was born July 31, 1987.

The family lived a chaotic lifestyle. They moved numerous times. Leona's two daughters from a prior marriage lived with them for a period of time, but were removed after Betty, age six, accused Bryan Sr. of having sexual intercourse with her, and doing other "nasty things" to her. A physical examination of Betty revealed substantial evidence of sexual abuse, including an enlarged vaginal opening almost twice the normal size. A child abuse report was also filed against Leona for denial of critical care. This was based on her failure to take action with knowledge of the abuse. Leona's two daughters were placed with Leona's former husband.

Bryan and Leona relied heavily on Bryan's mother, Sandra, for their support. Sandra encouraged Leona to participate in SSI, with Sandra as the payee. Sandra took care of the family's finances, and gave money to Bryan and

Leona when needed. Bryan's I.Q. is around 70. Leona's is also low.

Leona and Bryan separated in May of 1988 when Leona and the children left the home. Leona recounted incidents of physical abuse against herself and the two oldest children by Bryan and his family. In July 1988, a child abuse referral was made when Bryan located the children and obtained a temporary custody order. The police, however, were unwilling to turn the children over to Bryan given his angry and aggressive behavior and Leona's reports of abuse. A subsequent investigation resulted in a founded child abuse report against Bryan for sexual abuse and denial of critical care. Leona stated that Bryan often brought pornographic movies into the home and watched them in the bedroom with the children. She also stated that she and Bryan had intercourse and masturbated in front of the children. Several relatives testified that the boys played with their genitals excessively. Bryan denied intentionally having sex in front of the children.

Leona ultimately divorced Bryan. The district court, however, did not make an award of custody given the pending juvenile court proceeding. In May 1991, the juvenile court case was dismissed by agreement of the parties. Leona had also remarried.

Tragedy struck that same month when Bryan, Jr., was killed in a house fire. He apparently started the fire by playing with matches. A founded child abuse report was

filed based on Leona's failure to properly supervise the children.

On June 25, 1991, Miley and Myrtle were removed from Leona's custody and the State filed a CINA proceeding. At a removal hearing, the juvenile court agreed to return the children to Leona subject to her acceptance of family preservation services.

At the dispositional hearing, all parties agreed to continue placement of the two children with Leona with protective supervision. Bryan agreed to submit to a psychological evaluation and home study. Bryan was allowed supervised visitation with the children.

On October 2, 1991, the children were removed from Leona's custody and placed in foster care after Leona had failed to attend counseling and parental services. Leona separated from her new husband around this time. At an April 1992 dispositional hearing, the parties agreed to continue the children's placement in foster care until completion of Bryan's psychological profile. At the July 1992 hearing, the children were ordered to remain in foster care. The court order allowed unsupervised visitation if permitted by the therapist. The children began to exhibit more negative behaviors and had poor socialization skills.

The home case study report by the DHS recommended that Bryan be given an opportunity to parent the children subject to intensive supervision, parenting training, and ongoing therapy. The psychological profiles suggested that

Bryan did not fit the behavioral patterns of a pedophile and that the past incidents of sexual abuse were isolated incidents. Following these reports, Bryan sought custody by filing an application for modification of the dispositional order.

The permanency plan of October, 1992 indicated that both children were involved in play therapy, with extensive services for abuse. The plan also reported that Bryan and Leona were having regular supervised and some unsupervised visits. However, the foster parents noted the children began aggressively acting out following these visits. The caseworker stated that Bryan should continue to seek counseling to address his past sexual abuse issues.

In November 1992, the juvenile court held a hearing on Bryan's application for modification. Citing the long history of abuse, the court determined that neither parent was ready to take care of the children. The court ordered extensive visitation with the children, including unsupervised visits. By 1993, however, the caseworkers reported increasing acting out behavior by the children surrounding visits with their parents. The children were diagnosed with attention deficit hyperactive disorders. The DHS workers recommended continued long-term placement in foster care.

In February 1994, the children's guardian ad litem requested that Bryan's unsupervised visits be suspended based on the children's continuing acting out behavior. In

March 1994, the State filed a petition seeking termination of parental rights. Bryan filed a resistance, requesting that he be awarded custody of the children. Leona, however, consented to termination of her parental rights and requested that Bryan's rights be terminated as well. The juvenile court granted the State's application for termination. Bryan has appealed.

Bryan contends he was not provided sufficient opportunity to prove that he could successfully care for the children. He maintains that it was difficult for him to comply with the juvenile court orders since he lived over six hours away from the DHS' offices in Woodbury County. He denies he perpetrated sexual abuse against his children. He claims these charges were brought up due to his deteriorating marriage with Leona. He notes that he has, on his own, completed parenting classes. He also claims he has remained alcohol and drug free for several years. Bryan claims he was not given a chance to demonstrate his parenting skills, and he requests he be given a trial period to show the court he is capable of caring for the children.

Our review is de novo. In re M.S., 519 N.W.2d 398, 399 (Iowa 1994). We are not bound by the findings of the trial court, but give them weight especially when considering the credibility of witnesses. In re M.L.O., 477 N.W.2d 393, 394 (Iowa 1991).

The primary consideration in termination proceedings is the best interests of the child. Iowa R. App. P. 14(f)(15). In making this assessment, we look to the child's long-range and immediate interests. In re K.F., 437 N.W.2d 559, 560 (Iowa 1989). We consider the child's likely future in the hands of the parent. In re Dameron, 306 N.W.2d 743, 745 (Iowa 1981).

The father's parental rights were terminated under Iowa Code section 232.116 (1)(c), (e) and (h) (1993). Termination is permitted under subsection (c) when there has been a prior child in need of assistance adjudication based on physical or sexual abuse, and the circumstances which gave rise to the adjudication continue to exist despite services being offered or received by the parents. Termination is permitted under subsection (e) when a child in need of assistance is fours years old, has been removed from the parent's custody for twelve months or more, and there is clear and convincing evidence that the child cannot be returned at the present time to the custody of the parents. Termination is permitted under subsection (h) when a child is in need of assistance based on physical or sexual abuse or neglect as the result of the acts or omissions of a parent, and there is clear and convincing evidence that the circumstances surrounding the abuse or neglect constitutes an immediate danger to the child, despite the receipt of services.

The focal point of our review is the two founded sexual abuse reports and the subsequent court orders requiring Bryan to address the sexual abuse reports through an evaluation and services. Bryan eventually obtained an evaluation, which concluded he did not fit the profile of a sexual abuse perpetrator or a pedophile. He uses these results to support his claims that the sexual abuse reports were false and that he complied with the court directions.

We do not share Bryan's belief that the results of the evaluations diminished the impact of the prior founded sexual abuse reports or otherwise paved his way for the children to be placed in his care. The evaluation interviews were conducted without a complete history of the case. The psychiatrist who conducted the first evaluation did not receive a written history of the case from Bryan's attorney until after his interview with Bryan, and was unable to confront Bryan with the prior founded sexual abuse reports. Bryan denied any sexual abuse during his interview. Similarly, the psychologist who conducted the second evaluation did not know Bryan had not admitted the founded sexual abuse reports against him at the time the evaluation was conducted. He acknowledged this could affect his assessment. The psychologist was also concerned about Bryan's intelligence level. Furthermore, nine months passed between the time the court directed Bryan to obtain the evaluation and the time the first evaluation was conducted. The children, in the meantime, were growing up in foster care.

We also recognize the extensive nature of the abuse reports. The 1984 reports indicate that the children involved displayed numerous signs of abuse, including excessive masturbation and initiating sophisticated sex play with other children. The 1988 reports revealed that Bryan Jr., at age 3, also displayed signs of sexual abuse, and would sexually attack his sister. The signs of sexual abuse were serious, obvious and extensive, with substantial evidence of Bryan's involvement. In that light, Bryan did little to take the necessary steps to enable him to resume care of the children. He chose to use the evaluations to deny responsibility for the sexual abuse.

We also recognize Bryan's borderline intelligence and the children's special needs. See In re M.S., 519 N.W.2d at 400. Bryan reads at the first grade level and falls just within the fifth grade level in math. He has little insight or ability to think in the abstract. The children's special needs surpass Bryan's ability to meet those needs.

Finally, we cannot accept Bryan's claim that he has not been given a full opportunity to resume care of his children. Bryan did reside a considerable distance from his children and the DHS office which supervised his case. More, perhaps, could have been done to close the distance and make it easier for Bryan to visit the children. The distance, however, was not the source of Bryan's problems. In truth, Bryan is not capable of meeting the needs and

structure of the children, and reunification is not possible. We agree with the juvenile court that Bryan's parental rights should be terminated.

AFFIRMED.