

IN THE COURT OF APPEALS OF IOWA

No. 0-537 / 90-862

FILED

OCT 23 1990

CLERK SUPREME COURT

IN THE INTEREST OF J.F.C.D., J.P.M.D., J.T.F.D.,
R.M.A.D., and J.J.N.D., Children.

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P.M., Mother,

Appellant.

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

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

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

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

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

HAYDEN, J.

This case involves five children: boys born in March 1979, May 1980, and June 1981, a girl born in April 1983, and a boy born in December 1984. Their parents were formerly married to each other; the marriage was very violent and was dissolved in 1988.

In the parents' home the children were physically abused, sexually abused, and neglected. The neglect included consistently inadequate nutrition. Sexual abuse of at least four children by the father has been established; sexual abuse by the mother is less clear. Several of the children have severe behavioral problems attributed in large part to sexual abuse. The youngest child has several serious physical illnesses, some probably stemming in part from inadequate nutrition. His health problems include inadequate bone calcification and a severe bone marrow infection. The mother has resisted proper medical care and has sometimes refused permission for medical procedures; on one occasion she allegedly refused to permit a blood sample and told a nurse "he's not worth it."

All five children have been adjudicated children in need of assistance (CHINA) and have been in foster care continuously since January 1988.

In October 1989 the State filed the present petition to terminate the parental rights of both parents with respect to all five children. 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 over four years old, has been adjudicated CHINA, has been in foster care for twelve of the last eighteen months, and cannot safely be returned to the parents' care. (With respect to the father, the juvenile court also relied on the additional ground of voluntary consent to termination.)

The mother has appealed the termination order. The father has not appealed.

The mother challenges the sufficiency of the evidence to establish the children cannot safely be returned to her care or termination is in the children's best interests.

The mother also contends she was denied due process because the termination was preceded by CHINA review hearings where an improper burden of proof was allegedly imposed on her. She complains that in review hearings following an initial CHINA adjudication, the parent must bear the burden to prove the child can safely be returned to the parent's home. She asserts this burden allocation denies due process. She argues in CHINA review hearings the State should continue to bear the burden to prove a separation of parent and child is necessary.

Finally, the mother contends she was denied due process because the juvenile court refused to compel the State to answer certain interrogatories propounded by the mother.

Appellate review of juvenile proceedings is de novo. See In re W.G., 349 N.W.2d 487, 491 (Iowa 1984), cert. denied, 469 N.W.2d 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.

Appellant asserts initially the trial court erred in placing the burden of proof upon her to show, by a preponderance of the evidence, a change in circumstances since the original adjudication which warrants returning the children to the parents. The Iowa Supreme Court has held that to be the correct allocation of the burden of proof in review cases. See In re Welcher, 243 N.W.2d 841, 844 (Iowa 1976); In re Blackledge, 304 N.W.2d 209, 214-15 (Iowa 1981).

Mother's attorney asserts that under Santosky v. Kramer, 455 U.S. 745; 102 S. Ct. 1388; 71 L. Ed. 2d 599 (U.S. 1982) the State bears the burden of proof by a "clear and convincing evidence" standard at a permanency/review hearing. Iowa Code section 232.104(5) indicates that following a permanency order "the child shall not be returned to the care, custody or control of the child's parent or parents, over a formal objection filed by the child's attorney or guardian ad litem, unless the Court finds by a preponderance of the evidence, that returning the child to such custody would be in the best interest of

the child." The mother asserts under Santosky the State always bears the burden of proof by a "clear and convincing evidence" standard in relation to keeping the child out of the parent's home. Therefore, she argues, Iowa Code section 232.2104(5) violates fourteenth amendment due process by placing the burden on the parents to show, by a preponderance of the evidence, return of the child to the parents' custody is in the best interests of the child. We do not agree.

Santosky addresses the standard of proof in relation to termination of parental rights. Iowa Code section 232.116 requires proof by "clear and convincing evidence" in order to terminate parental rights. Therefore, Iowa's statute complies with Santosky's fourteenth amendment due process requirements. Santosky does not require the State to bear a proof by "clear and convincing evidence" standard at every step of the proceedings. A review hearing does not result in the extinguishment of parental rights. At worst, a review hearing results in a recommendation that termination of parental rights be pursued. The proof by "clear and convincing evidence" standard applies at the termination hearing.

Santosky states that the nature of fourteenth amendment due process in a termination of parental rights proceeding turns on a balancing of three factors: 1) the private interests affected by the proceedings; 2) the risk of error created by the State's chosen procedure and 3) the

countervailing governmental interests supporting use of the challenged procedure. We find the Iowa statutory scheme satisfactorily balances these factors. A clear and convincing evidence standard is required to remove the child from the parent's home, and the same standard applies to termination of parental rights hearings. The application of this standard at these stages provides the parents with the due process protection required by Santosky.

Finally, we find the mother's argument is moot in the instant case because the State's evidence is adequate to meet a clear and convincing evidence standard.

Since the Santosky decision the Iowa Supreme Court has had an occasion to address the differing burdens of proof applied in termination versus review proceedings as reported in the case of In Interest of Chad, 318 N.W.2d 213 (Iowa 1982). The court held the clear and convincing standard is constitutionally required in termination proceedings but failed to hold the State must be held to this same burden of proof in review proceedings. Chad, 318 N.W.2d at 219. This allocation of the burden of proof in review proceedings in no way jeopardizes the parent's due process rights as the State is still held to the clear and convincing standard in the event termination of parental rights is sought. Id.

The Iowa Supreme Court has further noted: "If our previous holdings are to be overruled, we should ordinarily

prefer to do it ourselves." State v. Eichler, 248 Iowa 1262, 1270, 83 N.W.2d 576, 578 (1957). As such, we decline appellant's invitation to attempt to overrule Welcher and Blackledge. See also In re D.S., 437 N.W.2d 587, (Iowa App. 1989).

We turn now to the appellant mother's allegation the juvenile court improperly denied her motions for discovery and sanctions. Iowa Rules of Juvenile Procedure 1.1 and 1.3 indicate discovery should be as free and full as possible. These rules further state the Iowa Rules of Civil Procedure, divisions V and VII, governing discovery and depositions, also apply to juvenile procedures.

The juvenile court denied the mother's discovery requests as the mother had full access to all the reports and CHINA files regarding her children. In addition, she was given extra time and money to obtain the statistical information she sought from other counties despite the State's relevancy objections.

"[T]he trial court has wide discretion in its rulings on discovery issues and will be reversed only when an abuse of discretion is found." AgriVest Partnership v. Central Iowa Production Credit Assoc., 373 N.W.2d 479, 482 (Iowa 1985); see also State ex rel. Shanahan v. Iowa District Court for Iowa County, 356 N.W.2d 523, 526 (Iowa 1984).

Here the juvenile court found the gathering of the requested information would entail enormous trouble and expense for the State. Additionally, the information was

already just as available to the mother. The court even allowed money to pay the attorney's costs for collecting this data. Out of the six counties contacted for information, only two (Polk and Scott) kept the requested statistics. The others did not have the requested information available.

The mother's attorney contended there was disparity in the treatment of child termination cases by the different counties. Even if the attorney had gathered more statistics on terminations, we fail to see what relevancy these would have given the facts of this case. We believe an identical result would be reached by almost any court in this state.

The information was available to the mother. The juvenile court did not abuse its discretion in denying the mother's motions for discovery and sanctions, nor did it abuse its discretion in requiring her, if she wanted the information, to obtain it herself. We affirm the juvenile court on this issue.

Finally, the mother attacks the sufficiency of the evidence to support the termination order. 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).

We look to the child's long-range, as well as immediate, interests. We consider what the future holds for the child if returned to his or her parents. Insight for this determination can be gained from evidence of the parent's past performance, for that performance may be

indicative of the quality of the future care the parent is capable of providing. Our statutory termination provisions are preventative as well as remedial. They are designed to prevent probable harm to a child.

In re R.M., 431 N.W.2d 196, 199 (Iowa App. 1988) (citing to Dameron, 306 N.W.2d at 745)); see also In re A.C., 415 N.W.2d 609, 613 (Iowa 1987).

To answer the mother contention's, we must look at the facts presented. The youngest boy was admitted to the hospital with severe and debilitating bone diseases attributable to malnutrition. He had multiple growth arrest lines attributable either to childhood disease or malnutrition. He was also diagnosed with a severe case of osteomyelitis, an infection of the bone marrow. This disease requires exposure of the bone and scraping of the infected material.

The mother refused to authorize a necessary transfusion, surgical procedures, and a necessary local anesthetic. The father eventually gave permission. She refused to give a blood sample of her own blood to screen out possible genetic problems. She made statements to the effect the child was not worth it; she would rather he feel the pain than have the morphine. She apparently feared her son would become addicted, and the transfusion would harm him. Considering the child's grave medical condition, we do not find the mother's conduct to be in his best interests.

When the other children were removed from the home, they were found to be sleeping in a damp and filthy basement near the furnace and hot water heater. The children reported they had to get their own meals, often by sneaking up to the refrigerator. They stated they never knew who was going to get the meals. They reported frequent fighting between their parents.

In the foster homes the children exhibited extreme sexualized behavior. Sexual abuse, including use of a vibrator, was founded by the father on all four of the boys. Although no sexual abuse by the father on the girl was found, she and the boys did engage in sexualized activity.

The children have inevitably developed severe mental and behavior problems from this abuse. The children rubbed feces on the walls of their foster home. They had to be put in separate foster homes when two of the boys were discovered trying to bite each other's genitals.

When visits were had with either parent, the children would react violently and traumatically, both before and after. They exhibit no desire to return to their mother. Indeed, they appear to have made great strides toward recovery in the foster care environment.

Our main concern remains the best interests of the children. The mother will not admit any failing on her part and continues to deny the clear evidence of abuse. She does not perceive she has changes to make. She has

difficulty dealing with the case plans. Further, she does not appear to understand the effect her actions and those of her husband had upon the young lives placed in her care. We cannot say with certainty the harm which befell these children previously would not reoccur if we were to return these children to their mother. At this juncture, termination of parental rights appears to be in order.

The mother has enough problems dealing with her own beatings and traumatization. She has shown herself to be unable to properly protect and nurture her children. The evidence indicates this inability continues. Additionally, she is reluctant or refuses to give permission for necessary medical care for her children. With the severe condition of the youngest, it is critical he be in the care of responsible persons attuned to his needs.

Based upon the record before us, we determine there is clear and convincing evidence to support the termination of the mother's parental rights in this case. We affirm the termination of the mother's parental rights by the juvenile court.

AFFIRMED.