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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE INTEREST OF T.R.M. AND T.J.M.

D.M.O.W.,	)	
Appellant,	)	Filed January 26, 1983
vs.	)	
STATE OF IOWA,	)	2-401 68225
Appellee.	)	

Appeal from Delaware District Court - Alan L. Pearson, Judge.

The natural mother appeals from the trial court's order terminating her parental rights pursuant to Iowa Code section 232.116(5), asserting (1) that there was not sufficient evidence that termination would be in the children's best interests; (2) that there was not sufficient evidence that the children could not be returned to her custody; and (3) that the trial court took judicial notice of the proceeding in which the children were adjudicated to be in need of assistance without requiring that the file in the CHINA proceeding be made part of the record and without indicating in its ruling the matters of which it had taken judicial notice. AFFIRMED.

Daniel H. Swift of Swift & Swift, Manchester, Iowa, for appellant.

Thomas J. Miller, Attorney General of Iowa, and Bret Hage, Assistant Attorney General, for appellee.

Mary Lou Tracey of Tracey & Tracy, Manchester, Iowa, for minors.

Heard en banc.

DONIELSON, J.

The natural mother, D.M.O.W., of the two children, T.R.M. and T.J.M., appeals from the trial court order terminating her parental rights pursuant to Iowa Code section 232.116(5). On appeal, the natural mother asserts: (1) that there was not sufficient evidence that termination would be in the children's best interests; (2) that there was not sufficient evidence that the children could not be returned to her custody; and (3) that the trial court took judicial notice of the proceeding in which the children were adjudicated to be in need of assistance without requiring that the file in the CHINA proceeding be made part of the record and without indicating in its ruling the matters of which it had taken judicial notice. We affirm.

T Appellate review of proceedings to terminate a parent-child relationship is de novo and, while we accord weight to the findings of the trial court, we are not bound by those findings. In Interest of Dameron, 306 N.W.2d 743, 745 (Iowa 1981).

I.

In December 1979, T.R.M. and T.J.M. were adjudicated children in need of assistance and placed in a foster home. The mother was no longer living with the children's father and her relationship with the man (J.M.) with whom she was living was volatile. He drank and often physically abused her. Because she felt he was a danger to the children and also because she felt emotionally unable to care for the children while dealing with him, the mother had asked that the children be removed from her home.

In September 1981, the State filed a petition for termination of the parental rights of both parents. The natural father did not take any part in the proceedings. At the termination hearing, there was testimony about the mother's lack of employment, her lack of a permanent home, and the continuation of her relationship with J.M. At the time of the hearing, T.R.M. was seven years old;

T.J.M. was six. The mother also had two children by J.M., and was pregnant with a third.

In February 1982, the juvenile court found that the children had been adjudicated to be in need of assistance, that they had been in foster care for more than twelve months, and that they could not be returned to their parents' custody. The juvenile court therefore terminated the parental rights of both parents pursuant to Iowa Code section 232.116(5) and transferred guardianship and custody to the department of social services. Only the mother has appealed.

II.

On the merits, appellant asserts that there is no clear and convincing evidence that the child cannot be returned to her custody as provided in section 232.102. In examining the record before us, we are guided by well established principles which were stated by the court in the Dameron case.

> Central to a determination of this nature are the best interests of the child. [citation] In this connection, we look to the child's long range as well as immediate interest. Hence, we necessarily consider what the future likely holds for the child if returned to his or her parents. Insights for those determination can be gained from evidence of the parents' past performance, for that performance may be indicative of the quality of the future care that parent is capable of providing. [citations]
>
> This court has often recognized that there exists a parental interest in the integrity of the family unit; nonetheless we also are cognizant that this interest is not absolute, but that it may be forfeited by certain parental conduct. [citations] Because the State as parens patriae, has the duty to assure that every child within its borders receives proper care and treatment, it must intercede when parents abdicate that responsibility. [citations]
>
> Furthermore, it is our view that the current statutory termination provisions applicable here, like those they replace, are preventive as well as remedial. The provisions therefore mandate

> action to prevent probable harm to a child and do not require delay until harm has occurred. [citations]
>
> Finally, as previously noted, the grounds alleged here for the termination of parental rights must by statute be proven by clear and convincing evidence. [citation]

306 N.W.2d at 745. Of particular importance to the resolution of this controversy is the court's determination of the standard of the parties' burden of proof under Iowa Code § 232.116(5)(c).

> The reference to section 232.102 creates a burden of proof problem that we have recognized, but not previously resolved. See In re Dameron, 306 N.W.2d 743, 744, 747 n.4 (Iowa 1981); In re Adkins, 298 N.W.2d 273, 278 (Iowa 1980). The problem is that section 232.114(5)(c) requires clear and convincing proof that the child cannot be returned to the custody of the parents, whereas section 232.102(6) requires that temporary placement be terminated and the child returned to his home if the court finds, by a preponderance of the evidence, that the child will not suffer harm in the manner specified in section 232.2(5). See, e.g., In re Blackledge, 304 N.W.2d 209, 214-15 (Iowa 1981). We resolve this conflicting standard of proof problem by holding that in the termination of parental rights context, the clear and convincing standard of section 232.114(5) prevails and applies to the showing of harm requiring pursuant to section 232.2(5). In other words, before a termination of parental rights can occur under section 232.114(5), there must be clear and convincing proof that the child will suffer harm in the manner specified in section 232.2(5). This is the minimal burden of proof now required in this type of case by the due process clause of U.S. Const. amend. XIV. Santosky v. Kramer, ___ U.S. ___, ___, 102 S.Ct. 1388, ___, 71 L.Ed.2d 599, 603 (1982).

In Interest of Chad, 318 N.W.2d 213, 219 (Iowa 1982).[1] With these principles in mind, we examine the merits of this controversy.

Our **de novo** review convinces us that the facts present the tragic, and recurring, situation of a mother who became so totally dependent on a man for

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[1]Section 232.114 was renumbered section 232.116 in the 1981 Code.

financial and emotional support that she finds it impossible to terminate the relationship even after it becomes brutal and threatens the well being of her children.The trial court found that none of the social workers recommended termination and in fact some disapproved of it. We agree with the State's argument that the experts' recommendations are not binding on the court. See In Interest of Osborn, 220 N.W.2d 632, 633-34 (Iowa 1974).

The social worker recommended that appellant's parental rights not be terminated primarily because she demonstrated a desire to remain separated from J.M. and to provide a home for T.R.M. and T.J.M. It is clear that she has separated from J.M. many times during their relationship and was unable to keep from reuniting with him. He was present at the hearing and appellant testified that, while she did not have feelings for him at the time of the hearing, she did not know how she would feel about him in the future. It is also clear that when she is with J.M., the children are exposed to real and present danger. At the time of the hearing appellant had custody of two of J.M.'s children and was pregnant with his third. She also indicated that she thought it would be best for T.R.M. and T.J.M. to remain in long-term foster care rather than being reunited with her, but that she would rather take them than have her parental rights terminated. Yet she had not even attempted to visit them for almost three months prior to the termination hearing.

The court found, and we agree, that this situation has continued for far too long. The girls were ages 6 and 7 at the time of the termination hearing and their best interests require that they be available for permanent adoption. For months preceding the hearing, the court directed appellant to make progress toward establishing a home life into which she could bring her children, T.R.M. and T.J.M. She has not. Furthermore, at the hearing the court found that there was sufficient proof requiring termination, but gave appellant yet another chance.

Specifically, the court gave her an additional two weeks to actually obtain the apartment she claimed that she had put a deposit on. The court indicated that if she proved that she obtained such living arrangements, then her parental rights would not be terminated. She made absolutely no effort to contact the court regarding whether she had obtained such living arrangements. We agree with the trial court that it makes no sense to delay the termination of her rights any further.

III.

Appellant also challenges that the court took judicial notice of the prior CHINA proceedings without following the procedures outlined in In re Interest of Adkins, 298 N.W.2d 273, 277-78 (Iowa 1980). We find this contention to be without merit since it is not apparent to us that the court did, in fact, take judicial notice of the proceedings. Further, even if judicial notice was taken without following the Adkins procedures, there is no reversible error; in our de novo review we arrive at the same conclusion as did the trial court without considering the CHINA proceedings. See Adkins, 298 N.W.2d at 278.

We thus affirm the trial court's termination of appellant's parental rights.

AFFIRMED.

All judges concur except Oxberger, C.J., and Johnson, J., who dissent.

JOHNSON, J.

I respectfully dissent.

The State makes much of the fact that the mother voluntarily relinquished her children to the department of social services. However, I believe she should not be condemned for an act which was clearly in the best interests of the children at the time. She was concerned about the abuse in her home and sought to remove the children from such an environment while she endeavored to alter that environment. There is absolutely no evidence in the record that the children were being abused by either the mother or J.M.; the mother's fear was that the anger directed toward her by her roommate might be redirected at her children. Using the mother's voluntary relinquishment of the children against her could discourage other parents who fear for their children's safety from acting in the best interests of the children because of the fear of loss of their children to the State.

Since the State has had custody of the children, the mother has made real attempts to resolve the conflicts in her relationship with her roommate, which indeed has been rocky. The two have had a recurring pattern of breaking up when the roommate engaged in drinking, and abuse, followed by reconciliation on the roommate's representations that he would change his behavior. This was the course of their conduct up to the time of the hearing on termination, at which time they were again separated. During this period of unrest, the mother had two children by her roommate and at the time of the hearing was expecting a third. It appears she had no employment and almost no marketable skills. While it is most regretable, it is also most understandable why the mother financially could not extricate herself from the relationship easily or immediately.

The mother received considerable guidance from the department of social services attempting to solve her domestic problems. The social workers who monitored her progress testified at the termination hearing. Social worker Cartey

testified that the mother had progressed in her relationship with her roommate. In fact, it was the department's design to have a suitable family environment which included the roommate. He did not recommend termination of her rights at this time. Social worker Mitchell also testified that the mother had progressed in dealing with her domestic troubles. Mitchell testified that the mother had in fact made a deposit on an apartment. Mitchell further stated that the mother's recent move for independence was delayed partially because of the bureaucratic delay in receiving financial assistance due to the mother's change of residence to another county. Mitchell also opined that the mother's motiviational level to change her environment had increased and that there was a possibility of returning the children to the home. Last to testify was social worker Funte who stated the foster care situation was progressing well and that termination of parental rights would be detrimental at this time.

The trial court found that none of the social workers recommended termination and in fact some disapproved of it. While the opinions are not determinative, they can be extremely helpful in resolving such conflicts and should be scrutinized carefully.

The mother testified at the hearing and stated that she was not seeking the immediate return of the children. She needed time to move into the apartment and to "settle in" with her twins before she would be prepared for the return of the other children. Additionally, she was awaiting the birth of another child.

On the basis of the record before us, I cannot say that the State proved by clear and convincing evidence that the children could not be returned to the mother under sections 232.116(5)(c). This is an instance in which the mother is seeking financial and emotional independence from the apparent source of her problem. It is a difficult road to follow and one which may not be immediately successful. However, all the social workers who testified stated that the mother was progressing toward establishing a suitable home environment and that the

return of the children at a future date could be in the children's best interests. The goal of the department in situations such as this should be to "provid[e] rehabilitative services . . . to abused children and their families which will stabilize the home environment so that the family can remain in tact without further danger to the child." See Iowa Code § 232.67 (1981). Additionally, chapter 232 is to "be liberally construed to the end that each child under the jurisdiction of the court shall receive, preferrably in his or her own home, the care, guidance and control that will best serve the child's welfare and the best interests of the state." Iowa Code § 232.1 (1981) (emphasis added).

I believe, under the present circumstances as shown by the record, that foster care for the children should be continued together with the rehabilitative services for the mother. I am aware of the trial court's concern that this matter has been pending before the court for two years and that such a lengthy supervision may be detrimental to the best interests of the children. While I admit the legitimacy of concern about undue protraction of proceedings, I find the trial court in this instance gave such a consideration undue emphasis.

I would caution the mother that, while the evidence does not now support termination, termination may become a reality if she fails to continue her progress in resolving her domestic problems. If at any time the mother would cease her growth as a parent or expose the children to the type of environment which resulted in their custody being placed with the department, her rights to the children should be terminated upon application to the court. I would also order the mother continue sessions with the department to facilitate the return of the children, and that the children continue in foster care. Accordingly, I would reverse the termination of the mother's parental rights and remand this case to the trial court with directions.

Oxberger, C.J., joins this dissent.