IN THE COURT OF APPEALS OF IOWA

No. 3-288 / 93-172

FILED
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CLERK SUPREME COURT

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IN THE INTEREST OF C.D., B.D., E.D. and A.D., Minor Children,

S.D., Father,

Appellant.

Appeal from the Iowa District Court for Linn County, Patrick R. Grady, Associate Juvenile Judge.

The father appeals the termination of his parental rights to his four children. **AFFIRMED.**

Jon Kinnamon of Kinnamon, Kinnamon, Russo & Meyer, Cedar Rapids, for appellant.

Bonnie J. Campbell, Attorney General, John M. Parmeter, Special Assistant Attorney General, Judy Sheirbon, Assistant Attorney General, Denver D. Dillard, County Attorney, and Rebecca Belcher, Assistant County Attorney, for appellee State.

Crystal Usher of Wilson, Matias, Usher & Leff, Cedar Rapids, attorney and guardian ad litem for minor children.

Christine L. Crilley of Ackley, Kopecky & Kingery, Cedar Rapids, for mother.

Considered by Oxberger, C.J., and Schlegel and Hayden, JJ.

SCHLEGEL, 900136

The father appeals the termination of his parental rights to his four children, C.D., B.D., E.D., and A.D. He contends: (1) the State failed to prove by clear and convincing evidence the statutory requirements for termination; (2) the State failed to prove by clear and convincing evidence the absence of a less restrictive alternative to termination; (3) the court erred in admitting the opinion testimony of two DHS workers regarding whether the father's parental rights should be terminated; (4) the court erred in permitting the testimony of a State psychological expert; (5) the court erred in failing to admit the testimony of the children involved in this case; (6) the State failed to give the father notice that the State intended to introduce evidence concerning a CINA proceeding from another county; and (7) Iowa Code chapter 232 violates due process as applied to the father.

S.D. is the natural father of C.D., B.D., E.D., and A.D. The parental rights of the mother are not at issue in this appeal. At the age of sixteen, S.D. was involved in an automobile accident in which he received a head injury. Apparently, the type of head injury S.D. received can cause difficulty with sexually inappropriate behavior.

In 1985, the State adjudicated the oldest child, C.D., to be a child in need of assistance. The State based its determination upon a finding that S.D. sexually abused C.D. S.D. pleaded guilty to indecent contact with a child

and was incarcerated. In 1988 the State dismissed the CINA case regarding C.D. apparently because S.D. no longer had contact with the children.

In April 1989 the juvenile court adjudicated the four children to be CINA pursuant to Iowa Code section 232.2(6)(c)(2). The mother subsequently began allowing S.D. unsupervised contact with the children. The court ordered S.D.'s removal from the home and ordered no contact between S.D. and the children.

After the State learned the children's mother planned to marry a man previously convicted of sexual abuse, the court removed the children from the home. The State subsequently filed a founded sexual abuse report regarding E.D. After E.D. revealed to her therapist that S.D. was the person who abused her, the State amended the report to name S.D. as the perpetrator.

In August 1989 S.D. and the children's mother remarried. The children remained in foster care. The court ordered a neurological examination of S.D. to investigate the possibility that his head injury caused his sexually abusive behavior.

At the time of the December 1989 review hearing, S.D. remained uncooperative in his sexual abuse counseling. The court ordered S.D. removed from the home and ordered S.D. to have no contact with the children. On May 14, 1990, the court found S.D. in contempt for violating the no-contact order, and the court subsequently ordered an inpatient psychological examination of S.D.

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In August 1991 the State filed a petition to terminate S.D.'s parental rights to all four children. The court subsequently stayed the petition pending the mother's guardianship appeal and the second dissolution action between S.D. and the children's mother. In the dissolution decree the district court deferred the issue of the children's custody and visitation to the juvenile court.

Prior to the termination hearing, S.D. subpoenaed the four children. The State and the guardian ad litem moved to quash the subpoenas, and the court refused to require the children to testify. The matter proceeded to a hearing on the termination. At the beginning of the hearing, the court denied S.D.'s motion to dismiss. S.D. claimed the juvenile court lacked subject matter jurisdiction over a termination hearing because the district court retained jurisdiction over the dissolution action. The juvenile court determined the dissolution action addressed different issues and determined the State was not estopped from proceeding with the termination.

During the hearing, the State produced the testimony of three DHS employees. They testified that they supported the termination of S.D.'s parental rights as a result of the sexual and physical abuse and S.D.'s failure to progress with the services offered. One DHS employee testified that S.D. had been found to have sexually abused a daughter not part of these proceedings. The finding was part of a CINA proceeding from another county. C.D.'s

psychologist testified that the termination of S.D.'s parental rights would be in the best interests of the children.

The court ordered the termination of S.D.'s parental rights pursuant to Iowa Code sections 232.116(1)(c) and (e) (1991). Additionally, in respect to C.D. and E.D., the court ordered the termination of S.D.'s parental rights in accordance with Iowa Code section 232.116(1)(h). S.D. appeals. We affirm.

S.D.'s constitutional challenge to Iowa Code chapter 232 focuses on his belief the chapter violates his right to due process as it applies to him. He claims chapter 232 does not consider the rights of a disabled, brain-injured, divorced individual such as himself. He claims his visitation and legal interests can be prohibited or monitored by judicial officers pursuant to Iowa Code chapters 598.41 or 232.

Appellate review of termination proceedings is de novo. In re W.G., 349 N.W.2d 487, 491 (Iowa 1984) cert. denied sub nom. J.G. v. Tauke, 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. Id. 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).

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> 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 Dameron, 306 N.W.2d at 745).

In the present case, the district court terminated the father's parental rights to all four of the children in accordance with Iowa Code section 232.116(1)(c) and 232.116(1)(e). In addition, the court found termination of the father's parental rights with regard to C.D. and E.D. was supported by Iowa Code section 232.116(1)(h). Having reviewed the record and having carefully considered the parties' arguments, we conclude the district court's order terminating the father's parental rights to the four children is supported by clear and convincing evidence.

Iowa Code section 232.116(1)(e) (1991) provides:

> 1. Except as provided in subsection 3, the court may order the termination of both the parental rights with respect to a child and the relationship between the parent and the child on any of the following grounds:
>
> e. 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.

As the district court properly recognized, the State established these statutory prerequisites for termination of parental rights by clear and convincing evidence. At the time of the termination hearing, each of the children was more than four years of age, each had previously been adjudicated to be a child in need of assistance pursuant to section 232.96, and custody of each child had been transferred pursuant to section 232.102 for a period exceeding the required statutory time period. In addition, the record clearly supports the conclusion that these children cannot be returned to their father's custody as provided by section 232.102. Section 232.102(8) provides in part, "[t]he placement [of the child] shall be terminated and the child returned to the child's 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, subsection 6."

The district court found that if the children were returned to the father's custody, they would be at risk of being in need of assistance within the meaning of sections 232.2(6)(b) (the parent has physically abused or neglected the children, or is imminently likely to do so), 232.2(6)(c)(2) (the parent's failure to exercise a

reasonable degree of care in supervising the children), 232.2(6)(d) (the parent has sexually abused or is imminently likely to sexually abuse the parent's child[ren]), and 232.2(6)(n) (the parent's mental capacity or condition or drug or alcohol abuse results in inadequate care to the children). We agree. Accordingly, we affirm the district court's decision terminating the father's parental rights to the four children, C.D., B.D., E.D., and A.D., pursuant to Iowa Code section 232.116(1)(e).

The present record clearly indicates that termination of the father's parental rights is in the long-term and immediate best interests of these children. The accuracy of this determination is apparent from the record despite the fact the children will continue to remain in long-term foster care, maintaining a relationship with their mother, and despite the fact the children will not be subject to a stepparent adoption. We agree with the district court that "[t]hese children are better off without any father at all than to have [S.D.--the natural father] as their father." Besides, the record reflects the children have developed a healthy paternal relationship with their foster father.

Next, the father contends the district court abused its broad discretion in admitting opinion testimony of two DHS caseworkers and the State's psychologists regarding their recommendations that termination would be in the best interests of the children. In the present case proper foundation was laid to establish the fact that these

opinions were based on each person's contacts with the children and/or the parents. The district court acted within its discretion in permitting the caseworkers and other professionals involved in the case to testify about their recommendations based on the contacts they had with the family in question. See In re I.L.G.R., 433 N.W.2d 681, 688 (Iowa 1988); In re C.V.M., 478 N.W.2d 874, 877 (Iowa App. 1991).

The father also contends the district court abused its discretion by denying his request to compel the children to testify or to be interviewed by the court in order to ascertain their desires with respect to the termination of the father's parental rights. We find this contention to be without merit. Our supreme court has held "that a parent has no sixth amendment right to confront a child-witness at a civil termination of parental rights hearing." In re D.J.R., 454 N.W.2d 838, 846 (Iowa 1990).

In addition, during the termination hearing in the present case, the testimony of two psychologists was introduced which indicated that such questioning, whether formal or informal, would be traumatic and harmful. In In re H.R.K., 433 N.W.2d 46 (Iowa App. 1988), we held, under similar circumstances, that the parents were not entitled to have their attorney interview the children in a termination hearing, nor were the parents entitled to subpoena the oldest child to testify at the hearing. Id. at 49. It is clear the district court did not abuse its

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discretion in the present case by denying the father's request to compel the children to testify or to be interviewed informally.

Finally, the father, S.D., argues that as applied to him, the provisions of Iowa Code chapter 232 violate his substantive due process rights to parent these children. The father argues that the provisions of chapter 232, limiting his fundamental right to freedom of personal choice in matters of family life, are not "narrowly drawn to express only the legitimate State interest at stake." More specifically, the father apparently argues that the provisions of chapter 232 regarding the termination of the parent/child relationship are not narrowly tailored to provide for the best interests of children when their parent--whose parental rights are to be terminated--is a noncustodial, disabled, traumatically brain-injured parent who is divorced.

In such a situation, the father apparently argues that the State's interest in protecting a child from future harm at the hands of the parent is more narrowly effectuated if the dissolution court or the CINA juvenile court proceedings are used to determine the father's future relationship with the children. The father contends the best interests of the children will be better achieved since such proceedings would permit an ongoing relationship between the father and the children. The CINA proceeding, the father argues, would be ongoing in order to monitor the

long-term foster care of the children, and the dissolution proceeding would be ongoing since the district court has continuing jurisdiction in dissolution matters.

In this way, the father contends his legal interests regarding the children can be protected while, at the same time, achieving the best interests of the children since the father's rights can be prohibited and/or monitored by judicial officers in the future pursuant to Iowa Code section 598.41 as future treatment is offered to the brain-injured father. The father's entire argument appears to premised upon the father's contention that his brain injury is the sole cause of the actions which have led to the termination of his parental rights to these children. Furthermore, the father appears to be arguing that his parental rights should not be terminated until after he has participated in a particular program, which he has in mind, to assist his condition and, presumably, his parenting abilities.

We find the father's due-process argument to be entirely without merit. The father's argument, although presented in a slightly different context, is a familiar one which was discussed by our supreme court in In re D.J.R., 454 N.W.2d 838 (Iowa 1990). As was true in D.J.R., the father in the present case does not challenge the constitutionality of our statutes; his argument is essentially that the evidence in this case is so deficient that termination would be unconstitutional. See id. at 844. In D.J.R., the father argued:

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> [T]he State has no compelling interest in terminating his parental rights because no harm would be done by allowing his relationship with [the child] to continue as it has since 1985 or, conversely, that no benefit would accrue to [the child] from having the relationship severed.

Id. at 845.

The supreme court's response to this argument in D.J.R. is equally applicable to the present case. The court answered:

> We disagree. [The father's] inability or unwillingness to adequately parent [the child] has been established. We have long recognized that the best interests of a child are often not served by requiring the child to stay in "parentless limbo". See Long v. Long, 255 N.W.2d 140, 146 (Iowa 1977).

Id. at 845.

The court further stated:

> For purposes of substantive due process, we are not persuaded that the state's interest in protecting a child from future harm at the hands of the child's parents is less compelling where the state has protective custody of the child than where the parent has custody of the child. Protecting a child from harm is an equally compelling state interest in either case. [Footnote omitted.]
>
> The concept of "substantive due process" is not easily defined. We need not establish the exact boundaries of that concept in this case, however, because wherever they lie, the termination of [the father's] parental rights is well within them. Where valid statutory grounds for termination, such as . . . parental inability or unwillingness to adequately care for the child, are established by clear and convincing evidence, substantive due process is not offended by termination of the parent's parental rights. [Footnote omitted.]

Id. at 844-45. In the present case, we conclude that the

father's right to substantive due process would not be violated by terminating his parental rights with respect to the four children.

We have considered the remainder of the father's arguments on appeal and find them to be without merit. In accordance with the reasons articulated above, we affirm the district court's order terminating S.D.'s parental rights to C.D., B.D., E.D. and A.D.

AFFIRMED.