

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

IN THE INTEREST OF I.L.G.R.,)
C.L.G.R., and E.V.G.R.,)
Children,)

K.R., Father,)
Appellant.)

8-228
87-1209

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Appeal from the Iowa District Court for Polk (Juvenile)
Court (J6872-14), Vincent M. Hanrahan, Judge.

The natural father appeals a juvenile court order
terminating his parental rights. **REVERSED.**

William F. Denman, Des Moines, for appellant-father.

Thomas J. Miller, Attorney General of Iowa, and
Valencia Voyd McCown, Assistant Attorney General, for
appellee-State.

Heard by Oxberger, C.J., and Schlegel and Sackett, JJ.

SCHLEGEL, J.

K.R., the natural father of three children, appeals a juvenile court order terminating his parental rights. The father challenges the sufficiency of the evidence to prove that the children cannot safely be returned to his custody. He also contends the juvenile court erred in overruling his motion to restrain the foster parents from moving the children outside of Iowa.

Appellate review of proceedings to terminate a parent-child relationship is de novo. In re O'Neal, 303 N.W.2d 414, 422 (Iowa 1981). We accord weight to the fact findings of the juvenile court, especially when considering the credibility of the witnesses, but we are not bound by these findings. Iowa R. App. P. 14(f)(7); Long v. Long, 255 N.W.2d 140, 143 (Iowa 1977). We reverse and reestablish the father's parental rights.

K.R. and R.R., the children's natural mother, were married in June of 1983. Prior to their marriage they had a son, I.L.G.R., born December 10, 1981, and twin daughters, C.L.G.R. and E.V.G.R., born February 16, 1983. R.R. and K.R. had a difficult and turbulent marriage. Both parties suffered from emotional and physical problems for which they were hospitalized, both prior to and during the marriage.

From December 1983 to June of 1984, and in October of 1984, the children attended the Kathy Barnes Daycare

Center, located in Kathy Barnes' home. When R.R. and K.R. separated, K.R. was left with all three children, which he had difficulty handling by himself. On November 6, 1984, a doctor determined that I.L.G.R. and C.L.G.R. had venereal warts and it was later determined that all three children had been sexually abused. Two of the children made comments implicating their father, K.R., as the abuser, which they later denied. The children also implicated David Buslow, a former employer of the Kathy Barnes Daycare Center and a man named "Martin." K.R. has consistently denied abusing his children.

On November 14, 1984, K.R. voluntarily entered the mental health unit at Lutheran Hospital in Des Moines and asked the court that the children be placed in foster care. On January 3, 1985, the children were returned to K.R. who claimed he was stabilized and able to care for his children. On February 21, 1985, the children were removed from K.R.'s custody and placed in emergency foster care, based on reports that K.R. was having emotional problems and that the children were exhibiting extreme behavioral problems. The children have remained in foster care since, and, together, have lived in approximately four to five foster homes. During the course of the children's foster care, K.R. was allowed both supervised and unsupervised visitation. He also attended play group therapy sessions with the children. After the children's removal, further

evidence of sexual abuse was revealed. The twins' foster mother reported that she had observed "sexual acting out" by the twins and I.L.G.R.'s foster mother reported similar behavior.

On August 3, 1985, all three children were adjudicated to be children in need of assistance within the meaning of Iowa Code section 232.2(5)(c)(2). The parents were ordered to be afforded the opportunity to demonstrate their desire and ability to regain custody of the children by complying with the terms of a parent contract. Review hearings were held on February 7, 1986, October 27, 1986, and February 12, 1987. At each hearing, the court found the children could not be returned to their parents, confirmed the CHINA status of the children, and continued custody in the Department of Human Services.

The State filed a petition for termination of parental rights pursuant to Iowa Code section 232.116(5) on February 26, 1987. Upon hearing, the juvenile court terminated the parental rights of both R.R. and K.R. With respect to R.R., the court relied on the ground of abandonment. With respect to K.R., the court found that the harm and consequences of returning the children to his custody would be greater than any consequences of termination.

K.R. has appealed from the termination order. R.R. has not chosen to attempt to gain custody of her children. She has indicated that she is only interested in maintaining visitation with them.

I.

The petition to terminate parental rights was brought in accordance with section 232.116(5) of the Iowa Code, which allows termination if all three of the following conditions are met:

- a) The child has been adjudicated a child in need of assistance pursuant to section 232.96; and
- b) The custody of the child has been transferred from the child's parents for placement pursuant to 232.102 for at least twelve of the last eighteen months; and
- c) 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.

It is uncontested that conditions (a) and (b) of section 232.116(5) have been met. The children were adjudicated in need of assistance on August 15, 1985, and custody has been transferred from K.R. and R.R. for a period of at least twelve months. What R.R. does contest is the sufficiency of the proof offered in support of the juvenile court's determination that condition (c) has been met.

Section 232.116(5) refers to section 232.102, which refers to potential harm to a child resulting from a variety of circumstances listed in section 232.2(6). In Interest of K.L.C., 372 N.W.2d 223, 227 (Iowa 1985). In its petition to terminate parental rights, the State alleged that if returned to the custody of their father, K.R., the children would be imminently likely to suffer harmful effects as a result of his inability to provide

adequate supervision; and they would be imminently likely to suffer sexual abuse.

There are no hard and fast guidelines in determining the quantum of evidence necessary to meet the clear and convincing evidence standard of 232.116(5)(c), however certain general principles guide us in our review of this case. The best interests of the child are of paramount importance, In re Dameron, 306 N.W.2d 743, 745 (Iowa 1981), and we look to the children's long-range as well as immediate interests. "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 that parent is capable of providing." Id. It is presumed that the best interests of the child will be served by leaving the child with its parents, but this is not a conclusive presumption. In Interest of T.D.C., 336 N.W.2d 738, 740 (Iowa 1983).

Based upon our careful de novo review of the record in this case, we do not think that the State has carried its burden of proving, by clear and convincing evidence, that the children will suffer harm if returned to their father. See In Interest of K.L.C., 372 N.W.2d at 228. Although a close case, we find the following factors to be of significance in our determination:

1. That the children were found to have been sexually abused, repeatedly, is not in doubt. However, the evidence

is unclear, and contradictory at best, as to whether K.R. in fact sexually abused his children, as the State alleges.

At the temporary removal hearing in March 1985, Kathy Barnes of the Kathy Barnes Daycare Center, testified that the children were under her care from December 1983 through June 1984, and again in October of 1984. She also testified that a former employee of the daycare center, David Bushlow, sexually molested her child and another daycare child and was living in Kathy Barnes' home coincident with the period of time that K.R.'s children were there. Bushlow was subsequently convicted of child abuse in an unrelated matter and is serving 50 years. On November 5, 1984, Dr. Linda Railsback examined I.L.G.R. and C.L.G.R. and found that they suffered from venereal warts. E.V.G.R. was subsequently found to have venereal warts as well. Because of the genital warts, Dr. Railsback determined that all three children had been sexually abused. Both R.R. and K.R. were tested and found not to have venereal warts. The evidence is inconclusive as to whether David Bushlow had venereal warts. On February 21, 1985, the children were placed in foster care, and K.R. was allowed both supervised and unsupervised visitation.

On May 17, 1985, after further reports of sexual abuse, Dr. Barbara Cavallin, clinical psychologist, saw I.L.G.R. He claimed a monster or person named Martin "hurt his butt." Dr. Cavallin asked "if his daddy ever hurt his butt

and he said 'no.'" After a second visit on April 4, 1985, her report stated, "I then asked him who is David and he said 'David bit me.' I asked where did David bit and he would not respond."

On July 24, 1985, the twins, C.L.G.R. and E.V.G.R., were seen by Dr. Cavallin. She asked E.V.G.R. "if anybody hurt her bottom and she said 'Daddy did,' but then withdrew and would not say anymore. She could not tell me how her bottom had been hurt and at this point C.L.G.R. tried to distract me from talking by throwing a block. She cried when I took the block away and seemed again inclined to distract me from asking any more questions. However, C.L.R.G. denied that her Daddy had ever hurt her bottom at that point." Dr. Cavallin concluded that "The physical evidence seems to indicate that these children had been sexually abused. However, they at this point are not willing to indicate who the abuser was." Further reports indicate similar inconclusive evidence, with the children alternatively accusing K.R., and then denying that he was their abuser.

2. K.R.'s efforts in his attempts to regain custody of his children and to better himself, both emotionally and financially, convinces us that he has recognized his past weaknesses and is sincere in his desire to provide a loving and stable home environment for all three children. The record indicates that since February 21, 1985, when the

children were placed in foster care, K.R. has been, for the most part, assertive and cooperative in fulfilling the obligations of the parent contract set up by the Department of Human Services. Reports that K.R. was, at times, "slow in accomplishing the work on his contract" were apparently justified by his busy and irregular work schedule. The record also indicates that K.R. attended Play Therapy and private counseling sessions, that he made every effort to be with his children, and that he was observed to be "quite appropriate" with them.

Furthermore, we are persuaded by the fact that K.R. has terminated his relationship with his wife, R.R. and has since remarried. His new wife, S.R., has three of her own children and the couple were expecting a child on July 1, 1987. Gwen Lewis, P.C.D.H.S. worker, testified that her impression of S.R. was that she was kind and caring and seemed appropriate with the children. She also stated in her report that their home "is an attractive 3-4 bedroom house which is tidy and set up for a family with children." S.R. testified that she would be willing to accept the children into her home.

We also find it significant that, at the time of the hearing, K.R. had been employed as a resident counselor at a group home for mentally retarded youngsters for the past two years. Dixie Dupey, administrator for the home, and one of K.R.'s supervisors, stated that K.R. "has met the

demands of the position and continues to demonstrate his effectiveness as a counselor." In addition, it has been demonstrated that K.R., through medication and counseling, is able to control his mental illness. We are cognizant of reports indicating that K.R. is resentful of the fact that his children, despite his efforts, have remained in foster care since their removal on February 21, 1985, and continues to be frustrated by the State's intervention in this matter. Nonetheless, we are convinced from the record that K.R. has made significant changes in his lifestyle since the children have been out of his care. Contra, Interest of K.L.C., 372 N.W.2d at 228.

In view of the foregoing, we find that the State has failed to establish a factual basis for termination of K.R.'s parental rights by clear and convincing evidence in accordance with the standard under 232.116(5)(c). We therefore reverse the juvenile court's termination order and reestablish K.R.'s parental rights.

II.

K.R. also contends that the juvenile court erred by overruling his motion to restrain the foster parents from moving the children out of the State of Iowa pending entry of a decree in this case. K.R. relies on the Iowa Supreme Court's decision in In Interest of A.C., 415 N.W.2d 609, 612 (Iowa 1987), and argues that the court impermissibly allowed his children to bond with the Duncan foster

family. We disagree. Unlike Interest of A.C., the record does not indicate that the Duncans "resolutely set out to make the temporary placement a permanent one." Id. We do, however, agree with the language of the court which stated:
There is a pressing societal need for temporary foster homes. The child victims of abuse are in desperate need of shelter and care. During the time required for courts or officials to process and consider their needs, the children must be nurtured in a safe environment.

Id. at 614. The record indicates that the children have been in the Duncan home since 1985 and their placement has been satisfactory. We find that the juvenile court's ruling concerning this matter was correct. The juvenile court's termination order is reversed.

REVERSED.