IN THE COURT OF APPEALS OF IOWA

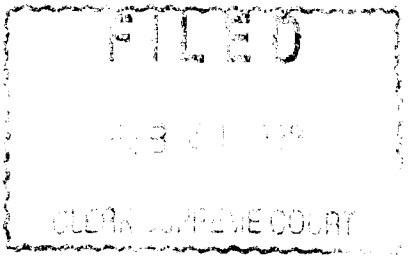
No. 8-752 / 98-900
Filed February 24, 1999

IN THE INTEREST OF S.H., T.P., and B.P.,
Minor Children,

J.P., Grandmother,
Appellant,

E.H., Mother,
Appellant,

B.P., Mother of T.P.,
Appellant.



Appeal from the Iowa District Court for Polk County, Karla J. Fultz, Associate Juvenile Judge.

Two mothers appeal the termination of their parental rights, and a grandmother appeals a no-contact order against her. **AFFIRMED.**

Barbara Durden Romar Des Moines, and Catherine K. Levine, Des Moines, for appellant J.P.

Marcia L. Schober, Altoona, for appellant E.H.

Susan R. Stockdale of Roehrick, Hulting, Blumberg, Kirlin & Krull, P.C., Des Moines, for appellant B.P.

Thomas J. Miller, Attorney General, Chris C. Odell, Assistant Attorney General, and Jaki Livingston, Assistant County Attorney, for appellee State.

Heard by Huitink, P.J., and Vogel and Zimmer, JJ.

VOGEL, J.

Eileen, mother of Bryan and Samantha, and Brandy, mother of Tiffany, appeal a juvenile court order terminating their parental rights. Janet, the mother of Eileen and Brandy, appeals a no-contact order against her.

Background facts. Janet is the mother of Eileen, Brandy, and Michael. Beginning in their childhood, Michael carried on an incestuous relationship with both of his sisters. Eileen became pregnant by him at age fourteen and gave birth to Bryan in June of 1989. Bryan is profoundly mentally retarded, autistic and has cerebral palsy; Janet was appointed his legal guardian shortly after his birth. Eileen and Michael's incestuous relationship continued even after her marriage. She became pregnant by Michael again, and gave birth to Samantha in October of 1992. Brandy became pregnant by Michael at age thirteen and gave birth to Tiffany in September of 1992. Both Eileen and Brandy initially denied any sexual abuse by Michael until confronted with the paternity tests conducted in September of 1996.

The Department of Human Services (DHS) investigated the family in July of 1996, after Janet's neighbors complained to police about the noise coming from the house at 3 a.m. At the time, Brandy, Tiffany, Eileen and Bryan were living with Janet. Police found Bryan, Tiffany and other family children running around, crying and screaming. The only adult present was sleeping behind a closed door. The house

was dirty and infested with roaches. Some of the children were naked; all were filthy and infested with lice.

Bryan and Tiffany were adjudicated CINA in September of 1996. Bryan was transferred to Glenwood State Hospital School. Tiffany was placed in foster care. Janet and Brandy's appeals of these adjudications were affirmed by us on appeal. *See In re T.P.*, No. 97-0551 (Iowa App. Jan. 28, 1998).

Samantha, Eileen, and Eileen's boyfriend, David, were living with Janet in August of 1996 when Samantha was removed due to sexual abuse by David. DHS eventually placed Samantha in foster care. She was adjudicated CINA in December of 1996; her adjudication was not appealed.

In October of 1997, the State filed a petition to terminate Eileen and Michael's parental rights to Bryan and Samantha; and filed a petition to terminate Brandy and Michael's parental rights to Tiffany. The termination hearings were conducted over several days in December of 1997. On April 30, 1998, the juvenile court filed an order terminating all parental rights. On May 1, 1998, the court then issued a supplemental no-contact order barring Janet from any contact with Bryan. Eileen, Brandy and Janet appeal.

I. Procedural issues.

a. Motion to continue/stay proceedings. Brandy and Eileen assert that the juvenile court erred in denying their motions to continue or stay the termination

proceedings until their CINA appeals were final. We find this issue is moot and not reviewable on the merits as the CINA appeals are now final. *See In re B.B.*, 516 N.W.2d 874, 877 (Iowa 1994) ("An issue is moot if it no longer presents a justiciable controversy because it has become academic or nonexistent.") (quoting *In re Meek*, 236 N.W.2d 284, 288 (Iowa 1975)).

b. Motion to sever/motion in limine. Eileen and Brandy raise separate issues which challenge the juvenile court's decision to hold a joint termination proceeding. Eileen's motion to sever and Brandy's motion in limine asserted that evidence not relevant to their particular cases would prejudice them. They assert that the court's denial of these motions was an abuse of discretion.

We are unaware of any case law addressing the issue of severance in a termination proceeding; however, as we are in equity, we will review de novo. *See In re M.N.W.*, 577 N.W.2d 874, 875 (Iowa App. 1998).

We find the juvenile court was correct in not severing the cases and in admitting evidence concerning all the children. Brandy's and Eileen's children had the same biological father and grandparents, and there would have been a tremendous duplication of evidence if two separate hearings had been held. Moreover, while separating the particular facts of a case might be difficult for a jury, a judge is better-equipped to compartmentalize the issues. *Cf. In re L.K.S.*, 451 N.W.2d 819, 822 (Iowa 1990) ("When a case is tried to the court, we presume the court separates

competent evidence from incompetent evidence."). The juvenile court's specific findings underscore our confidence that the court properly segregated the facts as they applied to each mother. Furthermore, while some testimony may not have been relevant to one parent's case, we do not find it was prejudicial.

II. Evidence to terminate. Both Brandy and Eileen assert that there was not clear and convincing evidence to terminate their parental rights.

The scope of review in termination cases is de novo. *See M.N.W.*, 577 N.W.2d at 875. The grounds for termination must be proven by clear and convincing evidence. *In re E.K.*, 568 N.W.2d 829, 830 (Iowa App. 1997). Our primary concern is the best interests of the child; we look to both the child's long-range and immediate interests. *M.N.W.*, 577 N.W.2d at 875.

a. Brandy. Brandy's parental rights were terminated pursuant to Iowa Code sections 232.116(1)(c) & (e).[1] Brandy first asserts that there is insufficient evidence

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[1] Iowa Code sections 232.116(1)(c) & (e) provide:

> 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:
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> c. The court finds that both of the following have occurred:
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> (1) The court has previously adjudicated the child to be a child in need of assistance after finding the child to have been physically or sexually abused or neglected as the result of the acts or omissions of one or both parents, or the court has previously adjudicated a child who is a member of the same family to be a child in need of assistance after such a finding.
>
> (2) Subsequent to the child in need of assistance adjudication, the

to terminate her rights under section 232.116(1)(c) because Tiffany's CINA adjudication was not based on physical or sexual abuse. However, section 232.116(1)(c)(1) allows termination when the court "has previously adjudicated the child to be a child in need of assistance after finding the child to have been physically or sexually abused *or neglected* as the result of the acts or omissions of one or both parents . . . ." (emphasis added). Tiffany was adjudicated under Iowa Code section 232.2(6)(c)(2), as a child "[w]ho has suffered or is imminently likely to suffer harmful effects as a result of . . . . [t]he failure of the child's parent, guardian, custodian, or other member of the household in which the child resides to exercise a reasonable degree of care in supervising the child." This clearly qualifies as a finding of neglect.

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parents were offered or received services to correct the circumstance which led to the adjudication, and the circumstance continues to exist despite the offer or receipt of services.

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 child has been removed from the physical custody of the child's parents 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.

Brandy also claims there is not clear and convincing evidence to support her termination under section 232.116(1)(e). However, the evidence supported that Tiffany could not be returned to Brandy at the time of the termination proceedings. Although Brandy had made some progress in therapy, she was not ready to resume parenting responsibilities. Her own therapist testified that she needs at least two more years of therapy.

We must reasonably limit the time for parents to be in a position to assume care for their children because patience with parents can soon translate into intolerable hardship for the child. *In re A.Y.H.*, 508 N.W.2d 92, 96 (Iowa App. 1994). At some point, the rights and needs of the child rise above the rights and needs of the parents. The legislature, through section 232.116, directs us to that point. *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa App. 1997).

Tiffany is in a pre-adoptive home and is in need of stability, which Brandy is not able to provide. We conclude there is clear and convincing evidence to support the termination of Brandy's parental rights to Tiffany.

b. Eileen. Eileen's parental rights to Bryan and Samantha were terminated pursuant to Iowa Code sections 232.116(1)(c) & (e). It is unclear if she is challenging her termination under one or both sections. However, we find clear and convincing evidence to terminate her rights under both sections.

At the time of the termination proceedings, Eileen had made significant progress in coming to terms with the abuse she had suffered from her brother. However, her therapist testified that she continues to exhibit a very dependant personality which inhibits her ability to effectively protect her children. The therapist also testified that Eileen's past denial and continued avoidance of her own abuse makes her ill-equipped to recognize when her own child is suffering abuse, as it did with Samantha.

Eileen was never able to parent Bryan without the help of her mother. She testified herself that she was unable to care for him at the present and did not believe that he could be safely returned to her mother's home or custody. Bryan's special needs require that he receive the kind of care that Eileen may never be capable of. We find clear and convincing evidence to support termination of Eileen's parental rights to Bryan and Samantha.

III. Janet's appeal. Janet contends that the juvenile court lacked subject matter jurisdiction to direct the probate court to terminate her guardianship of Bryan and lacked statutory authority to enter a no-contact order against her.[2]

a. Concurrent jurisdiction with probate court. Janet was appointed as Bryan's guardian in 1989. On July 10, 1997, all guardianship proceedings were suspended by

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[2] The record before us does not indicate whether the guardianship has been terminated or whether there has been any appeal.

the district court sitting in probate due to the commencement of CINA proceedings. *See* Iowa Code §§232.3, 232.61 (1997).

The State asserts, and we agree, that the juvenile court did not exceed its jurisdiction in granting concurrent jurisdiction to the probate court and requesting termination of the guardianship. The court's order provided that:

> . . . concurrent jurisdiction is granted to the Probate Court *to allow* the revocation of the Probate guardianship of Janet [] in conformance to this Court's Order of Guardianship for adoptive placement.

(Emphasis added).

The rights of a guardian pursuant to section 633.633 *et seq.* are suspended during the pendency of juvenile court proceedings. Following termination of all parental rights, the juvenile court granted concurrent jurisdiction to allow the probate court to terminate the guardianship. A contrary ruling by the probate court would be preempted by the juvenile court's broad jurisdiction in determining the best interests of the child. *See* Iowa Code § 232.3 (1997). We find no error in the court's order.

b. No-contact order. Shortly after entry of its termination order, the juvenile court entered a supplemental order which provided that Janet and her husband should have no contact or visitation with Bryan. Janet contends that the juvenile court lacked authority to enter a no-contact order against her. We do not believe Janet has properly preserved this issue for appeal. Even so, the juvenile court, with its broad powers of

powers of placement and disposition, had the authority to enter the no-contact order in the best interests of Bryan.

Having considered all issues properly before us on appeal, we hereby affirm the termination of Brandy's and Eileen's parental rights and the no-contact order against Janet.

AFFIRMED.