IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

IN THE INTEREST OF D.T., D.T., D.T., D.T., M.T., D.T., AND A.T., Children,

L.T., Mother,

Appellant.

8-167
87-1213

375

Appeal from the Iowa District Court for Polk County (Nos. 6654-14, 6653-14, 6753-14, 6754-14, 6757-14, 6756-14, 6905-14) - Vincent Hanrahan, Judge.

Mother appeals trial court's orders removing her seven children from her home and ordering them not be returned. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Donald Baybayan, Des Moines, for appellant.

Thomas J. Miller, Attorney General; Gordon E. Allen, Deputy Attorney General; and Charles K. Phillips, Assistant Attorney General, for the appellee State.

Heard by Hayden, P.J., and Sackett and Habhab, JJ., but decided en banc.

SACKETT, J. 376

This appeal by the mother of eight children in a children in need of assistance proceeding involves orders removing children from the family home and orders determining the children cannot be returned home. The natural father, who allegedly sexually abused two of the children is not a party to this appeal.

The eight children were born to the same two parents. The children were born in 1971, 1973, 1975, 1977, 1979, 1981, 1983, and 1986. This appeal involves only the older seven children. The eighth child has been removed from the home, however, the child was not born when the order appealed from was entered. Therefore the order removing the eighth child is not subject to our review.

The family's involvement with human services started in the fall of 1983 when a child abuse report was filed. The report alleged the parents disagreed with the school district's determination one of their male children should be placed in a special education class. The parents wanted the child left in the regular classroom. A report filed at that time states the family home was filthy. No additional action was taken on the 1983 abuse report.

On January 2, 1986, the mother gave birth to the seventh child. The family had no health insurance and little money. Because of lack of finances, the mother had not been able to arrange to obtain medical care when the

birth became imminent. The child was born at home. The fire department entered the home for the purpose of assisting after the birth. The fire department found the home full of clutter and debris. The mother and child were taken to a hospital. A group of neighbors went into the home and cleaned it up. The clean-up took several days and resulted in considerable debris being removed from the home. The neighbors constructed bunk beds for the children.

An abuse report was filed on January 7, 1986. The matter was investigated and the department determined protective services were recommended. Court action was initiated. The parents met with a probation officer and a parental contract was established. The parents consented to cooperate with the Department of Human Services.

On August 4, 1986 a denial of critical care report was made recommending juvenile court action because the home was very dirty and the parents had not adequately cooperated.

On October 2, 1986 an abuse report was made determining the father had sexually abused the older two female children. The abuse occurred when the mother was absent from the home. The thirteen-year-old daughter said when she was ten or eleven, over a period of one to two weeks, her father had her take her clothes off, rubbed her chest and touched her in her vaginal area. The eleven-year-old

daughter said in late September 1986 her father had her take her clothes off, touched her chest and vaginal area and masterbated in her presence. The father had previously been hospitalized for mental problems. The mother said she would try to get the father to commit himself to the psychiatric ward at Lutheran Hospital. She took him to the hospital emergency room. He has had some counseling.

On September 5, 1986 the Child In Need Of Assistance petitions were filed for the eleven and thirteen-year-old daughters. On September 25, 1986 the trial court ordered the father to stay away from the eleven and thirteen-year-old daughters. On December 1, 1986 a Child in Need of Assistance petition was filed for four of the five younger children. Adjudicatory hearings were held on both petitions on December 17, 1986. The older daughters were found to be children in need of assistance. Custody was ordered to remain with the mother. The father was enjoined from contacting the children. The adjudication hearing for the seventh child was set for January 29, 1987. It was continued until March 19, 1987 because the attorney for the mother became very ill and was unable to represent her.

On March 13, 1987 an application for temporary removal of all seven children was filed and on the same date an ex parte order was entered ordering all children be removed from the parental home. The seven children were removed

from the family home. On March 16, 1987 a Child in Need of Assistance petition was filed on the eighth child. A hearing was held affirming the removal and determining the children should not be returned home.

This case involves an examination of the quality of the mother's parenting skills and her homemaking abilities. We also address issues of parental cooperation with the Department of Human Services and the obligations of the Department of Human Services to the children and parents when the department determines children to be children in need of assistance.

I. Emergency Removal

The mother first contends the emergency removal was not proper because the alleged grounds for the emergency removal were prior grounds that had been before the court earlier and the court had left the children in the family home. The March 16, 1987 application for temporary removal alleged:

1. The father was in the home.
2. The home was unsanitary; there was garbage and human feces in the home; and the bathroom drain was stopped up.
3. The children had inadequate bedding.
4. The children had inadequate clothing and shelter.
5. Both parents were mentally unstable.

After the emergency order was obtained for removal, two workers accompanies by deputies forced their way into the family home. The mother was in the home with three of the children. When the mother objected to the removal of the

children her hands were cuffed behind her back. The three children were then taken from the home. The mother was left in handcuffs while pictures of the inside of the house were recorded on video tape. The video tape shows the home to be neat and orderly.

Section 232.102(4) provides wherever possible the court should permit the child to remain at home. There is a rebuttable presumption the best interests of children are served when custody remains with their natural parents. In re Chad, 318 N.W.2d 213, 218 (Iowa 1982). The children had to be traumatized by the manner in which they were removed from the parental home. They were taken without advance notice to their mother.

Recognizing there may be cases where emergency removal is necessary, but also aware of the emotional trauma any child suffers on being forcibly removed from his or her home, the legislature has made provisions for temporary removal. The provisions are included under Iowa Code section 232.78 which provides:

> 1. The juvenile court may enter an ex parte order directing a peace officer to remove a child from the child's home or a child day care facility before or after the filing of a petition under this chapter provided all of the following apply:
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> a. The parent, guardian, legal custodian, or employee of the child day care facility is absent, or though present, was asked and refused to consent to the removal of the child and was informed of an intent to apply for an order under this section, or the parent, guardian, or legal custodian has a prior instance of flight to avoid a child abuse investigation.
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> b. It appears that the child's immediate removal is necessary to avoid imminent danger to the child's life or health.

> c. There is not enough time to file a petition and hold a hearing under section 232.95.(Emphasis supplied.)

The removal order here was obtained without following the statutory directives. The petition for removal made no allegation as required under section 232.78.1(a) and (c). The emergency order therefore should not have issued because the application did not meet the statutory requirement.

Although the issue on which we focus is whether the children should be returned home, we note our displeasure with the manner in which this emergency removal was handled. Children have bonding with and love for their parent. The fact parents may be inadequate does not mean the child does not love the parent. Prior to the removal this mother had stayed in the family home and cared for these children. The mother and the home were the children's' security and their stability. They loved their mother. The cries recorded on the video tape of one of the children for his mother focuses on the trauma this removal caused. The facts here did not justify the forcible removal methods used by the department. The mother, in accordance with section 232.78, should have been notified the removal order was being sought. We note too, a hearing was set in six days. We note as argued by the mother, the conditions upon which emergency removal was sought had been before the court and the children were allowed to remain in the home.

II.

The mother next contends there is not clear and convincing evidence the children cannot be returned to her. The issue inherent in the emergency removal order and in the decision not to return the children home is will the children suffer harm in the family home. We are always guided by the child's best interest. See In re Chad, 318 N.W.2d at 213. By promoting autonomous families we best promote the interests of children as well as those of parents. See Wald, State Intervention on Behalf of Neglected Children: Standards for Removal of Children 28 Stan. L. Rev. 623, 638 (1976). Generally children's needs are best met by helping parents meet their needs. See id. at 638. Foster care is generally considered to be an alternative to leaving a child in its home. Id. at 644. Separating children from parents has a negative impact on children, even children from bad homes. Most children are strongly attached to their parents and as far as the child's emotions are concerned interferences with parental ties whether to a fit or unfit psychological parent are extremely painful. Id. at 645. The quality of foster care is not guaranteed. Foster children are frequently subject to multiple placements making it difficult for them to achieve stable emotional development. Id. at 645-46. Foster care is expensive and costs considerably more per month than the best in-home programs. Id. at 646.

Removal from a home generates insecurity in a child and effects the child's ability to form future attachments. The inability to form attachments may permanently impair a child's ability to form living relationships. Id. at 670.

In reviewing an order finding children in need of assistance we recognize the removal is to be temporary and the intrusion upon the interest of a parent is less severe than where termination is decreed. Therefore the degree of scrutiny to be employed in evaluating that specificity will be less strict than in those situations in which a permanent severance of parental rights is involved. In re Wall, 295 N.W.2d 455, 458 (Iowa 1980). But a child in need of assistance proceeding may serve as the initial step in the termination process. Id. at 458. See also In re Long, 313 N.W.2d 473, 478 (Iowa 1981).

What makes this case so difficult is we are focusing on issues of quality of homemaking and parenting skills. We are dealing with a family on the lower social economic spectrum. In evaluating the mother's homemaking and parenting skills the only question is whether her skills are sufficient to ensure her children will not suffer harm if under her care.

The family owns or is purchasing a small three bedroom ranch style house in a rural Polk County community over twenty miles from Des Moines. The home has running water. It is not connected to a sanitary sewer. There is a septic

tank on the premises. The septic tank needs repair. The basement of the home is unfinished. There is a single toilet in the basement. Washing is done in the basement. Clothes are dried by hanging in the basement or on an outside line. The basement has a water problem.

Upstairs has a small living room. It is furnished with a couch, small TV, several chairs and a cupboard. The kitchen is small with stove, sink, refrigerator and a large table with chairs. There is no dishwasher or appliance to assist with garbage or trash disposal in the kitchen. The mother puts garbage in an uncovered bucket in the kitchen. There is a small bathroom with one sink, a vanity, a toilet, and a bathtub. There are three bedrooms; two have bunk beds and a single chest of drawers, and the third has a double bed and two cribs. The home is on a residential street. There are no sidewalks. The home has central heating. It appears it does not have central air conditioning. The father has been unemployed or underemployed during child raising years. The mother does not work outside the home.

The fundamental liberty interest of natural parents in the care, custody and management of their children is protected by the fourteenth amendment and does not evaporate because they have not been model parents or have lost temporary custody of their children to the State. Santasky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394-95, 71 L.Ed.2d 599, 606 (1982). The mother wanted a large family.

She has forsaken personal pursuits to devote fourteen years of her life to raising children. As a result there are strong emotional bonds between mother and children. The children love their mother. The family has few financial resources. The mother, given economic limitations and the size of her family, does not have the organizational skills to maintain a clean home.

We address first the issue of sexual abuse of the older daughters. The father committed the acts when the mother was not in the home. She recognized the problem and the fact he needed counseling. She took him for initial counseling. She took the daughters for counseling. She is criticized for not making sufficient effort with the counseling and letting the father back in the house despite a noncontact order. There is criticism, too, because the whole family, including the father, went to a hearing together. We find the mother has made an effort toward counseling, particularly when viewed in the context of the difficulties with child care and transportation she has in getting to counseling. The counseling was in Des Moines, over twenty miles from her home. She had inadequate transportation. To leave the home she had to get someone to care for the other children at home or take them with her. One counselor contended sessions were hampered because the mother brought the baby she was nursing with her. The mother contends on one instance she was severely criticized

for having a messy home when she had been gone for several days seeing counselors and the children remained home to mess up the house.

A second problem is the fact the mother let the father came back to the home in violation of the no contact order. The father was under orders not to return. He violated the order. The order is not under review. The mother's responsibility was to notify someone who could act if the father was in violation of the order. When the father came back she did not do this. She and the children loved and were dependent on the father. She was the only adult in the household with seven children. The father had had some treatment when he returned. The sexual abuse had occurred when the father was alone with the older daughters. There is no evidence she left the father alone with the children nor that there was any abuse at another time. In March 1987 one of the older daughters stated her father had not touched her since the abuse was reported.

The last issue is the cleanliness of the home. Society arbitrarily adopts certain standards and degrees of cleanliness. Clean homes do not necessarily make good parents. The degree of cleanliness of a home is relevant only where there is a showing the conditions are such a child will actually suffer harm if allowed to remain in the home. The evidence is the children are not very clean or well groomed. However, there is no evidence any children have

suffered injuries or illnesses. While we need not wait for an injury or illness to determine whether a home creates harm, we consider it relevant in assessing the dangers that the children have been healthy and injury free. The children have had head lice on occasion. They had head lice when removed from the home. Head lice is not a desirous condition, but it does not endanger health. It is a common condition in school children. It is very easily transmitted. This mother's problems in combating head lice were compounded by the fact that seven children were living in close quarters with one bathtub.

Judgments as to what is a clean house are based on cultural or class bias. See Santasky v. Kramer, 455 U.S. 745, 762, 102 S.Ct. 1388, 1399,1 71 L.Ed.2d 599, 612 (1982). We therefore have to determine whether the situation results in harm to the children. The children are basically healthy. There have been no serious problems. They are nice kids. There have been good family times. There was no evidence of any lack of school attendance. The only evidence is the children had good school attendance and their mother cooperated with the school. A letter in evidence from the school showed the mother to be cooperative, to have attended conferences, and a child missed seven whole days and four half days, three of which were for doctor appointments.

A careful review of the record convinces us there is a lack of understanding by human services of problems faced by a parent responsible for the physical and emotional needs of seven young children where because of economic factors, living quarters are small and substandard, and there is little money for home repair or clothing. After a home visit, the mother said "they visited the home after I had been gone for two days keeping appointments with counselors and the children were home to mess the home up."

A homemaker was engaged who tried to teach the mother to do things differently. What the mother needed was not time with lessons but help with the tasks. We fail to find the agency had sensitivity for or understanding of the problems associated with the making of a home or the ability of a mother's physical strength. This woman did not need responsibility for more tasks. She needed help in getting basic tasks done.

After removal the children were examined at Broadlawns Hospital. They all had head lice. There is no evidence any child had suffered any serious health problems or injury. The baby delivered at home was examined two times a week by a public health nurse. The nurse observed the baby was dirty. The baby was in good physical health and up to date on immunizations. The nurse observed the mother had good interaction with the baby. The children have been described as well-behaved as well as rowdy and not well disciplined.

Pictures taken the Christmas before removal show healthy, smiling children in a clean home with a pretty Christmas tree and presents under the tree. Other pictures show a messy house.

The order adjudicating the children as children in need of assistance should remain in place. We remand to the trial court to take such further evidence as is necessary to make orders to assure the return of these children to their mother's home and to assure the mother will receive reasonable assistance to help with the household responsibilities.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

All judges concur except Habhab, J., who specially concurs and Donielson, J., who dissents.

HABHAB, J. (specially concurring)

I concur in the result only. I especially agree that the children are in need of assistance and that the order so adjudicating should remain in force. The mother is in need of assistance to help her with her household responsibilities.

DONIELSON, J. (dissenting)

I would affirm the trial court.