IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

IN THE INTEREST OF J.S., A.L.F. III, AND J.L.F., Children;	)	
B.F. and A.L.F. II, Natural Parents	)	Filed March 9, 1988 331
Appellants.	)	7-600 87-505

Appeal from the Iowa District Court for Scott County (Nos. J(T) 5101-0187 and J(T) 5102-0187) - John G. Mullen, Judge.

The natural parents of three children appeal from the trial court's order terminating their parental rights. **REVERSED AND REMANDED.**

Gary D. McKenrick, of Gomez, May, McKenrick & Kelly, Davenport, for appellants.

Thomas J. Miller, Attorney General, Gordon E. Allen, Deputy Attorney General, and Valencia Voyd McCown, Assistant Attorney General, for appellee.

Considered by Oxberger, C.J., and Sackett, and Habhab, JJ.

SACKETT, J.

We address the parents' challenge to a trial court's order terminating parental rights under Iowa Code section 232.116(5).

A section 232.116(5) termination may only take place when the child cannot be returned to the parental home because definitional grounds of a "child in need of assistance" still exist. In Interest of K.L.C., 372 N.W.2d 223, 227 (Iowa 1985). The question before us is has the State established by clear and convincing evidence the children will suffer harm specified in section 232.2(5) if returned to their parents. Id.

Our review is de novo and we adjudicate rights anew. K.L.C., 372 N.W.2d at 227; In re Dameron, 306 N.W.2d 743, 745 (Iowa 1981).

> The permanency and completeness of termination make it the most severe consequence of a public intrusion into the parent-child relationship. It constitutes a direct interference by the state with the family's constitutionally protected right to privacy and the parents' constitutionally protected right to raise their children in a manner freely chosen. It also has profound sociological, psychological, and legal effects on the children involved.

Comment, Involuntary Termination of Parental Rights in Louisiana: Unraveling the Statute, 58 Tul. L. Rev. 1045, 1045 (1984).

We determine the State has not presented clear and convincing evidence the children cannot be returned to their parents. We reverse and remand.

We review the facts leading up to adjudication of removal and ultimately to the petition for termination. The appellants are married to each other and are the natural parents of A.L.F. III, a male child born July 30, 1982, and J.L.F., a male child born February 2, 1984. The third child, J.S., a female child born in December 1980, is the natural child of the appellant mother. She currently lives with her natural father, who is not a party to these proceedings. In June 1985 all three children were living with appellants. A complaint was made

to the Department of Human Services about the care the children were receiving. The complaint was lodged by the wife of the female child's natural father.[1] In July the parents took their older son to the emergency room to have a fishhook removed from his finger. Human Services determined he got the fishhook in his finger because he was playing unsupervised. Human Services conducted an investigation and ultimately filed a petition for an adjudication of the children as children in need of assistance.

The court found the children to be children in need of assistance and in doing so determined (1) the children had not been adequately supervised, and (2) the parents had failed to provide needed medical care. The basis for the determination the children were not adequately supervised were three instances. One was the fishhook incident. The second was the children were found playing in the street while their father was inside the house with friends. The record makes no reference to the type of street or the length of time the children were in the street. The third instance occurred when the children were left alone in the home. The record gives no indication of the time frame involved. The basis for the determination the parents failed to provide needed medical care was the fact the female child suffered from constipation and the older male child was at high risk for lead poisoning. A lead provocation test was negative and he was discharged without chelation therapy.

After the adjudication the children were not removed from the appellants' home. All three children were examined by a doctor about June 23, 1985. The doctor found all three children to be healthy. The only positive evidence of injury was an occult skull fracture noted on the older male child.

Human Services commenced a series of home visits (about three times weekly). The visits indicated no serious problems. The children were adequately

[1] A medical report made by a doctor to whom the stepmother took J.S. for a second opinion stated the stepmother had complained to Human Services.

fed, clothed and housed. The supervising worker did not consider the parents' relaxed attitudes toward disciplining the children to be appropriate. We consider the following facts:

> June 17, 1985: Investigator reports "The home appears neat and tidy and the children appear well fed." Children are adjudicated to be in need of assistance but court finds no grounds to remove them from their home.
>
> July 31, 1985: Social worker reports to court after one of her visits:
>
> > I expressed concern about A.L.F. III's behavior, which on 7-29-85 consisted of screaming, pushing a riding toy down the cement stairs outside the home and interrupting B.F. and me while we attempted to talk. The response I received from A.L.F. II was that his son would outgrow his behavior; how did I expect a 3 year old to understand and this was not problem behavior.
>
> September 17, 1985: Social worker reports to court:
>
> > There continue to be concerns about medical follow-through, consistent, appropriate discipline and supervision. To date, there have been no medical problems or concerns that have required B.F. and A.L.F. II to arrange for appointments, etc. However, it should be noted that on 9-09-85, J.S. was not feeling well and B.F. and A.L.F. II did not have a thermometer or children's medication to give her . . . . I feel at this time I do not have enough cause to recommend removal of any of the children. B.F. and A.L.F. II are providing adequate care and supervision to the best of our knowledge and from what has been observed. The home study completed on C.S. (natural father of J.S.) and his wife was very favorable.

In October 1985 X-rays of the children taken on July 23, 1985, were sent to Wilbur L. Smith, M.D., Professor of Radiology and Pediatrics at The University of Iowa Hospitals. On October 7, 1985, Dr. Smith wrote the following letter to the social worker:

> At your request I have reviewed radiographs identified as being obtained from [J.L.F.], [A.L.F. III], and [J.S.]. All radiographs are dated 7/23/85 and are identified as being the property of Mercy Hospital, Davenport, IA.

The radiographs of [A.L.F. III] show a probable right parietal skull fracture. The radiographs are limited to two views and the films are highly suspicious for such a fracture. I am unable to find any other fracture in his radiographs.

The radiographs of [J.S.] show a peculiar density in the lateral margin of the left distal femur. My best guess would be that this represented an old fracture. By old I would say at least a year old. A lateral view of this area would be very helpful in further delineating this abnormality. The remainder of her bone survey is normal.

Radiographs identified as belonging to [J.L.F.] show what I believe is swelling about the right elbow. There also appears to be a posterior fat pad on the right elbow. These are findings of trauma to the right elbow joint. Unfortunately I only have a single view and therefore I cannot define this clearly. The remainder of the radiographs appear normal.

I summary we have three children each with one radiographic evidence of skeletal trauma. Unfortunately with only single views the trauma on [J.L.F.] and [J.S.] is difficult to evaluate. If [J.L.F.] had any symptoms involving the right elbow at the time that the radiograph was obtained even though more views were not available I am confident that there is a fracture in the right elbow. [J.S.'s] history should be sought very carefully for trauma to the right leg at about age 2 or 3. In [J.S.] further views might be helpful in establishing the trauma. In [J.L.F.'s] case I am not certain that they will be helpful. I do not see a displaced fragment.

The radiographs are being returned to Mercy Hospital as of this date.

On October 25, 1985, Dr. Smith wrote the following letter to the Scott County Attorney:

This letter is a clarification of my October 7, 1985 letter to Mrs. Janine Johnson. In the interval since that letter I have received radiographs from Mercy Hospital, Davenport, IA identified as being obtained from [J.S.]. These radiographs show evidence of definite trauma to the left distal femur. This trauma is old, having occurred at least six months before the radiographs were obtained.

In clarification of my previous interpretations of the radiographs, the radiographs of [A.L.F. III] showed a right parietal skull fracture. These were survey radiographs and not detail radiographs and therefore I am 90% certain that there is a fracture there. Had the patient been here we would have obtained a tangential view and confirmed this with 100% certainty. The radiographs of [J.L.F.] show again what I am 90% certain is displacement of the posterior fat pad about the right elbow. This is almost always due to a traumatic injury this being a wretching or pulling type of injury with damage to the

> cartilage of the elbow. Again this injury is disclosed on a single view. If the patient had been available at that time we could have obtained multiple views and documented this to 100% certainty. If there is any clinical evidence at all that [J.L.F.] had an elbow injury at that time then I would be 100% certain that this radiograph was abnormal. A follow-up film of [J.L.F.'s] right elbow has a slim chance of showing some residual of the trauma. A single frontal view of the elbow can be obtained for this possibility.
>
> This case is a difficult one. [J.S.] shows unequivocal evidence of trauma to the left femur. If there is no explanation for this such as a car accident then this must be considered child abuse. [A.L.F. III] and [J.L.F.] show evidence of skeletal trauma to a high degree of certainty. If these children were involved in major accidents about the time of the radiographs one could accept that this was accidental trauma however lacking an appropriate history of major injury then one has to strongly suspect the possibility of child abuse. The presence of a sib with a documented fracture without explanation [J.S.] would further support this conclusion.
>
> The incidence of severe injury, death, and brain injury in cases of physical abuse is high. In some series the incidence of brain injury approaches 25% in children who are physically abused. It would be my feeling therefore that these children need to be protected either by continued surveillance of the home situation or placement outside the home situation if the surveillance cannot be assured.
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> The X-rays are being returned as of this date to Mercy Hospital in Davenport.

Based on these reports the children were removed from appellants' home on October 30, 1985. On October 30, 1985, the female child was taken by her stepmother to a different doctor for a second opinion. The doctor reported J.S. is "an essentially healthy girl."

Upon removal the female child went to live with her father and stepmother. That placement has gone well. The placement situation with the two boys has not been successful. The boys have each lived in four different foster homes. The older boy was removed from one foster home after an abuse investigation revealed he had been beaten, whipped with an electrical cord, tied up and locked in a closet while in foster care. The present foster parents report he is "wild and uncontrollable, hits other children," and "has a hard time sitting still for any length of time."

After the children were removed from the home the only visitation provided between the parents and children was supervised visitation. The social worker's report blamed the parents for not being able to adequately interact or to control the children during the one-hour supervised visitation that took place in her office. In making this assessment, which was one of the grounds she ultimately urged as supporting her position for termination of parental rights, the social worker gave no weight to the emotional impact the boys suffered from being placed in the four different foster homes and the effect of the older boy having been abused in one foster home. Children placed in foster homes often experience identity problems, conflicts of loyalty and anxiety about their future. Wald, State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L. Rev. 623, 645 (1976).

The parents and the children went through a series of evaluations. The appellants have followed through with appointments at the Child Development Clinic and have attended parenting classes. The father has followed through, as requested, with an appointment at an alcoholism treatment center. The alcoholism counselor found no probable cause to believe he was a chemical abuser. The social worker felt the alcoholism counselor made an incorrect finding. The father has also obtained a job. The appellants have moved into a different home, which the case worker found to be adequate and appropriate. The parents obtained medical supplies -- bandages, medicine, and a thermometer as suggested by the social worker. We find the parents have made significant and successful efforts to improve the home environment.

In January 1987 the State filed a petition to terminate the parental rights of the appellants in all three children. In March 1987 the court terminated

their parental rights to all three children. The parents appeal contending there is not clear and convincing evidence the children cannot be returned to them. The State contends that if returned to the parental home, the children are in danger of suffering from neglect and physical injury due to the fact that the parents have failed to make the changes necessary to provide the children with a safe environment. The State contends because the parents have failed to recognize the possibility of having a role in the injuries suffered by the children and have failed to show forethought as to how they would prevent such injuries from occurring in the future, their parental rights should be terminated. The State also contends if returned to the parents there is a danger that the children's developmental progress will regress.

The parents also contend the social worker has not treated them objectively and was intent on taking their children rather than helping them solve their problems. The social worker who assumed primary responsibility was not an employee of the Department of Human Services, rather she was an employee of an agency that contracted for services with the State. In September 1985 an assistant county attorney assigned to the case requested the court to order removal of the social worker from the case stating: "...it would be in the best interests of these children for a social worker to be assigned to the case [who] will review the facts and objectively report the facts to the court unfettered by a prejudgment of how the court ought to apply the law." Apparently this motion was never addressed and the worker remained on the case. Because the social worker promulgates, enforces, and makes determinations about violation of rules, care should be taken that the persons are objective. The judicial task of analyzing the encounters between the agency, children, and parents demands that we give careful attention to the probative facts that form the

opinions. See Santosky v. Kramer, 455 U.S. 745, 762, 102 S.Ct. 1388, 1399, 71 L.Ed.2d 599, 612 (1982). Because of the question about the social worker's objectivity, on our de novo review we pay particular attention to the probative facts that are the basis of her opinions. In termination of parental rights proceedings, which bear many of the indicia of a criminal trial, numerous factors combine to magnify the risk of erroneous factfinding. Santosky v. Kramer, 455 U.S. at 761-62, 102 S.Ct. at 1399, 71 L.Ed.2d at 612 (1982).

The primary purpose of CHINA proceedings is to help families correct parenting deficiencies and attempt to keep biological families intact, not to find grounds to remove children from their homes. 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. Santosky v. Kramer, 455 U.S. at 753, 102 S.Ct. at 1394-95, 71 L.Ed.2d at 606.

When a child is determined to be in need of assistance the parents become subject to the direction of persons who may or may not share the parents' philosophy of parenting and their goals for their children. Because the persons directed to assist the parents are generally well-educated there is a tendency for them to promulgate rules of parenting consistent with those of educated individuals who set goals for children consistent with the station in life they maintain. Because generally society wants what is best for children and because what is best for children is generally perceived as being that which will result in the child developing to full potential, goals are set consistent with that philosophy. The parents not having the education of the goalsetters and not always having the background to allow easy assimilation of the methods obviously become

frustrated and belligerent. These parents are often poor, uneducated or members of minority groups. Santosky v. Kramer, 455 U.S. at 763, 102 S.Ct. at 1400, 71 L.Ed.2d at 612-13; Smith v. Organization of Foster Families, 431 U.S. 816, 833-35, 97 S.Ct. 2094, 2103-05, 53 L.Ed.2d 14, 28-29 (1977). Such proceedings are often vulnerable to judgments based on cultural or class bias. Santosky v. Kramer, 455 U.S. at 763, 102 S.Ct. at 1400, 71 L.Ed.2d at 613.

Appellants also contend they were treated unfairly because of their socio-economic status. Both parents have below-average intelligence and were receiving public assistance. The mother was working outside the home. However, because of her limited training and abilities, the income she received was not adequate to meet her needs. Their's was a mixed racial marriage; the parents devoted a large portion of their life to a church which was not a mainstream church.

The parents here were expected to perform according to a series of arbitrary guidelines promulgated in large part by the person (the social worker) who would be enforcing the rules and ultimately judging their performance and making recommendations as to whether or not parental rights should be terminated. The parents disagreed with some of these guidelines.

In a termination case the State basically is in a position of structuring the evidence. This issue was discussed by the Unites States Supreme Court in an illustrative footnote to Santosky v. Kramer, 455 U.S. at 763 n.13, 102 S.Ct. at 1400 n.13, 71 L.Ed.2d at 613 n.13. In that footnote the court set out the parents' argument that the State sought court orders to prevent parents from maintaining contact with the children and the parents claimed the State cited the parents' rejection of social services which the parents found offensive or superfluous as proof of the agency's diligent efforts and parents own failure.

Without accepting the statements as true the court noted they were evidence of the State's ability to structure evidence and to increase the risk of an erroneous factfinding. The court's illustration in Santosky is particularly applicable to this case.

Parents under these circumstances have a serious obligation to try to communicate with persons directed by the court to assist them and parents also have a serious obligation to cooperate with providers of service. But parents have the right to be assured of the fair and objective delivery of services. Parenting ability should be judged by the parents' ability to perform within reasonable guidelines, not by whether or not the parents strictly follow arbitrary rules of parenting.

Because many of the issues involve the parenting of children, we draw from our own experiences and observations. A large thrust of the State's case is a disagreement with the parents over their philosophy of parenting. For example, considerable emphasis was put on the parents not using something called a "time out." The parents were taught to use time outs in a parenting class they attended. The failure to employ a "time out" as a discipline theory does not mean the child is in a home where he or she will suffer harm. The "time out" might work on some children. It obviously does not come with guarantees. Anyone who subscribes to the theory that you can raise and discipline all children by the same set of certain rules obviously has had very limited experiences or no experience in raising and disciplining children.

A difference in the philosophy of parenting is not a basis to terminate parental rights; nor is the fact a child may be handled better with a different discipline technique; nor is the fact someone else may do a better job of raising your child. The only issue is has the State presented clear and convincing evi-

dence there is a likelihood of the children being injured if returned to the parents. There are X-rays from which it was determined the children had been injured. The evidence of these injuries is introduced through two written medical reports. The doctor who examined the X-rays was never called as a witness or was he cross-examined. The medical reports do not address the question of when the injuries occurred. The reports do not clearly address what type of trauma would be necessary to cause the injury. There is no evidence what symptoms the injuries would induce.

We agree with the State that parents have responsibility when children in their custody are injured. These children had been in their parents' custody from birth to removal. The State argues the parents have a responsibility to explain what happened, and absent an explanation their rights should be terminated. It is possible either parent knew of and/or inflicted the injury. It is also possible neither parent inflicted the injury or knew about it. There is no evidence that anyone ever observed any facts which would indicate the children were injured or were suffering from injury.

The State has put this court in a difficult situation in presenting incomplete medical evidence with reference to these children's injuries.

In Santosky v. Kramer, the United States Supreme Court with reference to termination cases noted:

> The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense. No predetermined limits restrict the sums an agency may spend in prosecuting a given termination proceeding. The State's attorney usually will be expert on the issues contested and the procedures employed at the factfinding hearing, and enjoys full access to all public records concerning the family. The State may call on experts in family relations, psychology, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers whom the State has empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination.

455 U.S. at 763, 102 S.Ct. at 1400, 71 L.Ed.2d at 613.

The State has the burden of proof. We should not fill in the blanks in the State's evidence with assumptions. Additionally, in assessing the situation we look not only at the alleged injuries but the facts surrounding them. This is not a case where the children who were removed from the home had visible signs of injury. In June the children were examined by a doctor who found no signs of injury other than the X-ray showing an old skull fracture. From June to October the children remained in the parental home. The family had visits from a social worker three times a week. There was no reported evidence of physical abuse in the home. No one determined the children were being physically abused or that there was potential for physical abuse. The reports were the children were being taken care of. The X-rays that are read were taken at the time of intervention and showed evidence of injuries suffered at some unknown time prior to intervention. Despite a series of psychological tests there is no evidence either parent has the social profile of an abuser.

We do not find clear and convincing evidence the children cannot be returned. We reverse the order terminating the appellants' parental rights. The order finding the children to be children in need of assistance remains in place. We remand to the trial court with instructions to order a social worker or team that has not heretofore been involved in the proceeding to evaluate and make recommendations.

REVERSED AND REMANDED.