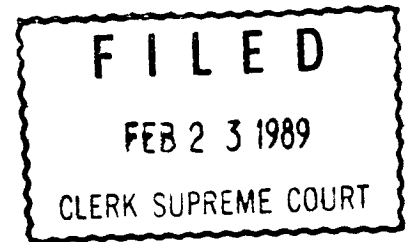


IN THE COURT OF APPEALS OF IOWA



IN THE INTEREST OF
H.E.K., A Child,

O.K., Mother

Appellant.

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9-43
88-1360

Appeal from the Iowa District Court for Polk County
(Juvenile) (No. 6932-14), Larry J. Eisenhower, Juvenile
Referee.

The mother of a child appeals from the termination of
her parental rights. **AFFIRMED.**

Ray Sullins, Des Moines, for appellant mother.

Thomas J. Miller, Attorney General; Katherine S.
Miller-Todd, Assistant Attorney General; and Ray Blase,
Assistant County Attorney, for the appellee State.

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

OXBERGER, C.J.

The mother of a child appeals the termination of her parental rights. She challenges the sufficiency of the evidence to establish the child cannot safely be returned to her custody. She also challenges the constitutionality of two subsections of Iowa Code chapter 232 relating to grounds and prerequisites for termination. Finally, she contends the termination was erroneous because the juvenile court did not hold a "preliminary hearing" pursuant to Iowa Code section 232.104(1), and because the county attorney filed the termination petition without direction from the juvenile court pursuant to Iowa Code section 232.104(2)(c). We affirm.

Our review of proceedings to terminate a parent-child relationship is de novo. In re Dameron, 306 N.W.2d 743, 745 (Iowa 1981). We accord weight to the fact findings of the juvenile court, especially when considering the credibility of the witnesses the court has heard and observed first hand, but we are not bound by them. Id.

The child in question is a girl, H.E.K., born in October 1986. Her parents were married to each other, and she lived with them for the first five months of her life. During this period she suffered serious and repeated physical abuse at the hands of her father. The injuries inflicted by her father during this period included a broken collar bone, two broken ribs, a broken elbow, a

broken upper arm, a broken lower arm, as well as numerous bruises, abrasions, and bite marks. While the mother, O.K., was not accused of inflicting any of the injuries, there was strong evidence that she was aware of the injuries and did nothing to prevent them or to protect the child from them.

In April 1987, when the child was slightly under six months old, she was removed from the parents' home and placed in foster care. On May 7, 1987, H.E.K. was adjudicated CHINA. She has remained in foster care since that time.

The child's father was convicted of three counts of felony child endangerment and is presently serving a prison term on those convictions. O.K. was also found guilty by a jury of two counts of child endangerment, however, the district court dismissed the jury verdicts against the mother in reliance on Iowa Code section 232.73, which provides immunity from criminal liability for a person who in good faith assists in a child abuse investigation or report; however, the supreme court reversed this ruling. See State v. O.K., slip op. Jan. 25, 1989.

Following H.E.K.'s removal from the home, O.K. participated in therapy and counseling. Her counselors expressed concern that she found it difficult to choose between her husband and the child, and that she continued to have an active relationship with her husband up to the

time he went to prison on the child endangerment charges. The marriage has since been dissolved. Counselors also expressed concern that O.K. shows a propensity to establish relationships of dependency with domineering men, and she may lack the ability or inclination to protect H.E.K. from harm inflicted by such men.

In May 1988, the State filed a petition to terminate the parental rights of both parents. After hearing, the juvenile court did terminate the parental rights of both parents. The juvenile court relied on Iowa Code section 232.116(1)(e). The mother appeals.

First, O.K. challenges the sufficiency of the evidence to establish the child cannot safely be returned to her custody. Central to a determination of this nature are the best interests of the child. In re Dameron, 306 N.W.2d 743, 745 (Iowa 1981). We look to the child's long-range, as well as immediate, interests. Id. We consider what the future holds for the child if returned to his or her parents. Id. 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. Id. Our statutory termination provisions are preventative as well as remedial. Id. They are designed to prevent probable harm to a child. Id.

The State must prove the allegations of the petition to terminate by clear and convincing evidence.' See Santosky v. Kramer, 455 U.S. 745, 770, 102 S.Ct. 1388, 1402, 71 L.Ed.2d 599, 617 (1982). Termination may occur under the statute where there is clear and convincing evidence that the child has been in foster care for twelve months and would probable suffer harm if returned home. Iowa Code § 232.116(1)(e) (Supp. 1987); In re Chad, 318 N.W.2d 213 (Iowa 1982). The child should not be forced to endlessly suffer the parentless limbo of foster care. Long v. Long, 255 N.W.2d 140, 146 (Iowa 1977). He or she need not endlessly await the maturity of his or her natural parent. In re T.D.C., 336 N.W.2d 738, 744 (Iowa 1983).

The record reveals O.K.'s past behavior in failing to protect her child create harm in returning H.E.K. to O.K. H.E.K. suffered many serious physical injuries at the hands of her father in her first five months of her life. The injuries included human bites over a period of five months, a fractured left clavicle and right elbow and numerous bruises and abrasions. O.K. was aware of this ongoing abuse by her husband. However, not only did she fail to protect her child from such abuse but further failed to seek help. O.K.'s inability to protect her child is further bolstered by the fact that even after H.E.K. was placed in foster care, O.K. continued to support and "stand by" her husband. She maintained this attitude despite

advice of a department worker and of the juvenile court officer. It was not until H.E.K. was in foster care for eleven months that O.K. began to make a decision to sever her relationship with her husband.

O.K.'s therapist recommended O.K. remain in intensive therapy for a minimum of one additional year. The therapist further testified H.E.K. "could not be safely returned to O.K. because there has not been enough time for changes, solid changes, to be made so that O.K. could stay out of destructive, abusive relationships so that she could maintain a solid sense of herself and handle things in a more productive way."

Upon our review of the record, we find clear and convincing evidence H.E.K. cannot safely be returned to O.K.'s custody.

Second, O.K. contends Iowa Code section 232.116(1)(e) denies due process because it allegedly creates a presumption that termination is in a child's best interest if the child has been in foster care for over a year. It is well settled that statutes are given a strong presumption of constitutional validity. See e.g., Miller v. Iowa Real Estate Comm'n, 274 N.W.2d 288, 291 (Iowa 1979); State v. Robbins, 257 N.W.2d 63, 67 (Iowa 1977).

Iowa Code section 232.116(1)(e) provides the court may order the termination of parental rights if:

e. The court finds that all of the following have occurred:

(1) The child has been adjudicated a child in need of assistance pursuant to section 232.96.

(2) 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.

(3) 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. (Emphasis added.)

Appellant focuses solely on the placement away from the parents and disregards the language of the statute which requires that all the requirements of section 232.116(1)(e) be met. We fail to find Iowa Code section 232.116(1)(e) to deny due process.

Third, appellant contends Iowa Code section 232.116(2) is unconstitutional in that it allows for a non-natural parent to compete with the natural parent for the child. Iowa Code section 232.116(2) provides a juvenile court considering whether to terminate parental rights shall give "primary consideration to the physical, mental, and emotional condition and needs of the child." Subsection 232.116(2)(b)(1) provides further that factors relevant to the child's emotional needs include integration into the foster family, as well as the length of time a child has lived in a stable, satisfactory environment and the desirability of maintaining that environment.

The appellant cites Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) to support her claim. We find Iowa Code section 232.116 to be in line with the holding in Santosky which requires the standard

of proof to terminate must be clear and convincing. Id. Further, case law points out in an action for the termination of parental rights, "we are not to engage in a comparison of the mother's home with the foster home." In re A.C., 415 N.W.2d 609, 613 (Iowa 1987). We fail to find Iowa Code section 232.116(2) to be unconstitutional.

Appellant next contends the decision to terminate her parental rights should be reversed because she did not have the permanency hearing provided in Iowa Code section 232.104 (Supp. 1987). Section 232.104 provides in relevant part:

1. If custody of a child has been transferred for placement pursuant to section 232.102 for a period of twelve months, or if the prior legal custodian of a child has abandoned efforts to regain custody of the child, the court shall, on its own motion, or upon application by any interested party, hold a hearing to consider the issue of the establishment of permanency for the child.

Appellant interprets the word "shall" to make a permanency hearing mandatory. We read this statute to mean if a party is interested in a hearing or if the court feels a need on its own motion, then the court shall hold a hearing. The word "shall" modifies the phrase "hold a hearing" and not the making of the motion.

Finally, the appellant contends the county attorney had no authority to initiate a termination proceeding without direction from the juvenile court pursuant to Iowa Code section 232.104. However, we find a permanency hearing is

not mandatory under section 232.104. Further, the county attorney has authority to file a petition under Iowa Code section 232.111(1) (1987).

We affirm the juvenile court's order of termination of parental rights.

AFFIRMED.