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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN THE INTEREST OF L.M.,
A Child,

S M.W., Mother,

Appellant.

Filed October 29, 1985 204

5-420
84-1656

Appeal from the Iowa District Court for Washington County, Max H Ruschmeyer, District Associate Judge.

The natural mother appeals from termination of her parental rights **AFFIRMED.**

Craig Arbuckle of Kiessey & Arbuckle, Washington, for appellant mother

H. Michael Neary of Gerard & Neary, Keokuk, guardian ad litem for the child.

Thomas J. Miller, Attorney General, Charles K. Phillips, Assistant Attorney General, and Gerald Partridge, County Attorney, for the State

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

PER CURIAM

L.M. was adjudicated a child in need of assistance along with her three siblings in March of 1982. The juvenile court found that on Thursday, October 8, 1981, nine-year-old L.M. attended school for the first time that week. L.M.'s teacher noticed that L.M. had a black eye and a red mark on her neck. L.M. was removed from the home by ex parte order. A physical examination revealed at least forty bruises on L.M. consistent with poking or punching. The bruise on the neck appeared to be a strangulation-type injury. The doctor testified that the bruises were inconsistent with a fall. L.M.'s family testified that L.M. had fallen down the stairs; however, L.M. testified that she was struck by D.W. and that D.W. twisted a rag around her neck.

A substantiated child abuse report also indicated that D.W. had disciplined L.M. by wrapping electrical wires around her toes to shock her. L.M.'s brother, G.M., was also found to be a victim of physical abuse by D.W. On the basis of this physical abuse and lack of supervision by their mother, the court ordered L.M. and G.M. placed with the Department of Human Services.

Up until the time of the *CHINA proceedings*, L.M. had lived at home with her natural mother, S.M.; her three siblings; her mother's boyfriend, D.W.; D.W.'s common-law wife, J.W.; and the six children of D.W. and J.W. None of the adults were employed.

The Department of Human Services formulated a plan to reunite L.M. and her mother. Its directives were incorporated into the juvenile court's order and included the following:

1. S.M. should refrain from further abuse or neglect.

2. S.M. should establish a residence separate from the W. family.

3. S.M. should have no further contact of any kind with D.W.

4. S.M. should participate in some type of program involving parenting skills training or family counseling.

At subsequent review hearings, the juvenile referee concluded that little progress had been made in counseling of S.M. and D.W. because they would not cooperate. L.M. was placed in a residential treatment facility and her mother visited her only once from May through November of 1983. The referee followed the Department of Human Services' recommendation and ordered termination proceedings to be initiated.

At the time of the termination hearing in June of 1984, S.M. and D.W. were married and had a child. The family's living arrangement had not changed from 1981. An order terminating S.M.'s parental rights in L.M. was issued on July 2, 1984.

S.M. has appealed, asserting that: (1) she was denied due process and a fair trial when trial was before the juvenile referee who had ordered that termination proceedings be commenced; (2) the petition was inadequate to specify the basis for termination; (3) D.W. should have been deemed a necessary party under Iowa Code sections 232.111(3)(b)(6) and 232.112(1) entitled to notice and representation at public expense; (4) the trial court abused its discretion by denying a request for psychiatric evaluations of S.M., D.W., and L.M.; (5) judicial notice should not have been taken of previous CHINA proceedings; (6) the evidence was insufficient to support termination; (7) S.M. and D.W. were denied constitutional rights against self-incrimination to the extent that termination was based on their failure to admit incidents of child abuse; and (8) S.M. was denied a constitutional right of privacy to the extent that termination was based on her failure to live apart from the person who is now her husband.

Our review of proceedings to terminate a parent-child relationship is de novo. In Interest of C.W., 342 N.W.2d 885, 886 (Iowa Ct. App. 1983). We

give weight to the fact findings of the juvenile court, especially when considering the credibility of witnesses, but we are not bound by them. In Interest of W.G., 349 N.W.2d 487, 491-92 (Iowa 1984); Iowa R. App. P. 14(f)(7). The best interests of the child are central to our determination. In Interest of Chad, 318 N.W.2d 213, 216 (Iowa 1982). "In this connection, we look to the child's long range as well as immediate interests. Hence, we necessarily consider what the future likely holds for the child if returned to his or her parents. 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. [Authorities]." In Interest of Dameron, 306 N.W.2d 743, 745 (Iowa 1981).

I. Referee Disqualification. S.M. argues that the juvenile referee should not have been allowed to conduct the termination proceeding which he had ordered to be commenced. She reasons that he had prejudged the case and, therefore, could not provide an impartial tribunal.

Iowa Code section 232.102 (1985) provides in pertinent part:

> 6. The duration of any placement made after an order pursuant to this section shall be for an initial period of six months. At the expiration of that period and every six months thereafter, the court shall hold a hearing and review the placement in order to determine whether the child should be returned home, an extension of the placement should be made, or a termination of the parent-child relationship proceeding should be instituted. (emphasis added)

This statutory provision clearly grants the juvenile referee authority to determine that termination proceedings shall be initiated.

In fact, under Iowa Code section 232.116(5) (1985), Referee Glen had only two alternatives at the time he ordered termination proceedings to be commenced. Because L.M. had been adjudicated a child in need of assistance, and custody of L.M. had been transferred from her mother for at least twelve months,

Referee Glen could either have returned L.M. to the custody of her mother or require a formal hearing to be held to determine if some other disposition would be in L.M.'s best interests. Making the child's welfare the paramount concern in juvenile proceedings does not violate the parent's due process rights. In Interest of Vandebook, 231 N.W.2d 859 (Iowa 1975). That Referee Glen chose the latter of the two alternatives meant only that the placement period had run, and it was not clear that L.M. should be returned to her mother's custody. The fact that an order was given initiating termination proceedings did not mean that S.M.'s parental rights would be terminated. Referee Glen's order did not reflect bias on his part nor did it require his disqualification from hearing the termination proceedings.

II. Adequacy of Petition. S.M. contends that the petition for termination did not adequately notify her of the grounds upon which termination was sought and the factual basis therefor. The original petition in question states:

> COMES NOW your Petitioner, the State of Iowa, and hereby Petitions the Court to terminate the parental rights of the child [L.M.] and in support thereof states:
>
> 1. That the child has been adjudicated a Child In Need of Assistance pursuant to § 232.96;
>
> 2. That the custody of the child has been transferred from her parents for placement pursuant to § 232.102 for over twelve months;
>
> 3. That clear and convincing evidence exists that the child cannot be returned to the custody of her parents as provided in § 232.102.
>
> WHEREFORE, Petitioner, the State of Iowa, prays that the Court terminate the parent-child relationship between the child [L.M.] and her natural parents [S.M.], and [G.M.], and terminate the parental rights of said natural parents.

Iowa Code section 232.111(3) (1985) requires that the petition for termination of parental rights include the following:

a. The legal name, age, and domicile, if any, of the child.

b. The names, residences, and domicile of any:

(1) Living parents of the child.

* * *

(5) Petitioner

* * *

c. A plain statement of those facts and grounds specified in section 232.116 which indicate that the parent-child relationship should be terminated.

The petition clearly stated the ground for termination specified in section 232.116(5). S.M. cannot seriously contend that she had no notice of the allegations against her. S.M. had participated in a CHINA adjudication and several subsequent review hearings. She received over two years of court orders and Department of Human Services case plans setting forth the defects in the family living arrangement and disciplinary techniques, and the need for improvements in these areas. "[Iowa] courts have found that a long and detailed history of juvenile court proceedings can afford the parent with ample information of what is expected of them." In Interest of M.H., 367 N.W.2d 275, 280 (Iowa Ct. App. 1985).

The contention that the petition failed to entirely satisfy the technical statutory requirements regarding the addresses and domicile of the parents and child is irrelevant given the amendments to the petition on December 13, 1983, which included this information. S.M. cannot deny that she had fair notice of the nature of the claim against her and was given a reasonable opportunity to litigate the same. See Lamantia v. Sojka, 298 N.W.2d 245, 247 (Iowa 1980).

III. Exclusion of D.W. S.M. contends that D.W. was a necessary party to the termination proceeding, yet was not named in the petition, joined as a party or served with notice.

Iowa Code sections 232.111 and 232.112 (1985) allocate necessary party status to parents, guardians, custodians and persons who stand in the place of the parents. D.W. clearly does not fall within any of these categories. D.W. was not a guardian or custodian appointed for L.M.'s benefit. L.M.'s guardian ad litem was Michael Neary and her custodian was the Department of Human Services. D.W. was not L.M.'s parent. In fact, at the time the termination petition was filed, D.W. was not married to S.M. and he has never adopted L.M. Because S.M. was still standing as L.M.'s parent, D.W. could not fall within the final category as a person standing in the place of L.M.'s parents. The fact that D.W. lived in the same household with S.M. and L.M., and L.M.'s natural father was not around, does not elevate D.W. into the place of L.M.'s father.

Furthermore, nothing in the record indicates that D.W. was excluded from the termination hearing. He could have been called as a witness by S.M. if she so desired.

IV. Psychiatric Evaluation. S.M. next argues that the trial court erred in denying her application for psychiatric examinations of herself, D.W., and L.M.

Iowa Code section 232.98 (1985) provides:

> 1. A physical or mental examination of the child may be ordered only after the filing of a [CHINA] petition pursuant to section 232.87 and after a hearing to determine whether an examination is necessary to determine the child's physical or mental condition.
>
> * * *
>
> 2. Following an adjudication that a child is in need of assistance, the court may after a hearing order the physical or mental examination of the parent, guardian, or custodian if that person's ability to care for the child is at issue.

S.M. filed her Motion for Psychiatric Examination after the petition to terminate parental rights was filed. During the prior CHINA proceedings, the

juvenile court ordered and received an in-depth mental evaluation of L.M. After receipt of that report, L.M. was placed in a residential treatment facility. This facility reported L.M.'s progress to the court. Because the court was already receiving information regarding L.M.'s mental health, we do not find that the court abused its discretion by denying another psychiatric evaluation of her.

S.M. points to no authority which finds error in the juvenile court's denial of a psychiatric evaluation of the natural mother. Both parties concede that the juvenile court has the discretion to order or deny mental examinations. There is nothing in the record which indicates that the court abused its discretion.

V. Judicial Notice. S.M. contends that the juvenile court erred in taking judicial notice of the information regarding the CHINA proceedings leading up to the filing of the termination petition. This was a termination action brought under Iowa Code section 232.116(5) (1985), which allows for termination of parental rights if the child has been adjudicated in need of assistance and has been placed away from her parents for at least twelve months.

While ordinarily judicial notice may not be taken of court proceedings in related but wholly different cases, a termination action presents an exception to this rule. In Interest of Adkins, 298 N.W.2d 273, 277 (Iowa 1980). In Adkins, the Iowa Supreme Court held it permissible for a court to judicially notice the prior CHINA case in a termination action commenced under section 232.116(5)'s predecessor, Iowa Code section 232.114(5) (1979). The court held judicial notice permissible so long as the following safeguards are employed: "Papers requested to be noticed must be marked, identified, and made a part of the record. Testimony must be transcribed, properly certified, marked and made a part of the record. Trial court's ruling in the termination proceeding should state and describe what it is the court is judicially noticing." Id. at 277-78. In this case, all exhibits were well marked and the juvenile court specifically identified what

documents and papers it judicially noticed in its order of July 2, 1984. Therefore, the Adkins safeguards were provided.

VI. Incrimination. S.M.'s next contention is that the juvenile court erred in basing its decision on S.M.'s failure to admit abuse because she was not granted immunity from the use of such statements in a later prosecution.

At no point during the termination proceedings did S.M. claim her fifth amendment privilege against self-incrimination. S.M. answered all questions regarding L.M.'s physical injuries without hesitation or objection other than on relevancy grounds.

> Q. Do you have information today about how [L.M.] got a black eye, and a ring around her neck, and bruises on her body that caused the Court to remove her from your home?
>
> MR. ARBUCKLE: Your Honor, to that we would like to urge the initial standing objection on materiality, relevancy and competency.
>
> THE COURT: Overruled. As the Court understands this question, do you have information, or do you know how. Was that the question?
>
> MR. PARTRIDGE: Yes. I think she answered it.
>
> A. No, I don't.
>
> Q. (By Mr. Partridge) You don't know how it happened? A. No.
>
> Q. Have you investigated to find out how it happened?
>
> MR. ARBUCKLE: Same objection.
>
> THE COURT: Overruled.
>
> A. No.
>
> * * *
>
> Q. And you did not admit the child abuse? A. That's right, because there was not no never child abuse.
>
> Q. You do not know child abuse? A. As far as I know, there was never no child abuse.

Q. But you didn't investigate, right? A. Yeah.

* * *

Q. Did you see any real need to change at your house? A. I didn't think I needed to change.

Q. Is that because you don't think any abuse took place at your house? A. That's right.

* * *

Q. And you didn't know of any child abuse? A. No.

Because this fifth amendment issue was not preserved below, we will not hear it for the first time on appeal. It was the juvenile court's duty in the hearing to determine whether L.M. could safely be returned to her mother's custody. The juvenile court did not err in this regard.

VII. Mother's Living Arrangement. S.M. also argues that the juvenile court erred in basing its decision on the failure of S.M. to live apart from D.W. She contends that the State's regulation of a couple's living arrangement constitutes an invasion of privacy.

In 1981, S.M. was ordered by the Washington County Juvenile Court to establish a residence separate from the W. family and have no further contact with D.W. The reasons stated for this order were that L.M. and G.M. were victims of physical abuse by D.W., D.W. was wholly in charge of the M./W. household and controlled the lives of S.M. and her children, and S.M. was unable to protect her children from D.W. Yet, S.M.'s living arrangement remained unchanged at the time of the termination and, in fact, she had married D.W.

We acknowledge it is a fundamental right of parents that they be allowed to rear their children. Stanley v. Illinois, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212, 31 L. Ed. 2d 551, 558 (1972). However, where children are not receiving proper care and treatment because the parents have abdicated their responsibility,

the State must intervene. In re Interest of Dameron, 306 N.W.2d 743, 745 (Iowa 1981). The paramount consideration before us is the best interest of L.M. The State concedes that the juvenile court does not have blanket authority to establish with whom S.M. lives. However, it contends that the court does have the authority to determine what type of home L.M. can be returned to safely. This position is the correct one.

During the CHINA proceedings, the Department of Human Services determined that if S.M. continued to live with D.W., L.M.'s health, safety, and welfare would be adversely affected. The juvenile court properly exercised its discretion in requiring that S.M. leave D.W. before she could have L.M. back. Throughout the CHINA proceedings, this living arrangement had a detrimental effect on S.M.'s ability to care for L.M.

It was reasonable for the juvenile court to conclude that S.M. had not improved as a mother because she had not severed her ties from the environment which caused L.M.'s removal from her custody in 1981. The court did not abuse its discretion in considering S.M.'s failure to change this home environment as a factor weighing in favor of termination of parental rights.

VIII. Sufficiency of Evidence. S.M. contends that there was not clear and convincing evidence justifying the termination of her parental rights.

Iowa Code section 232.116(5) (1985) provides that the court may order the termination of parental rights if it finds that:

> 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 section 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 conceded that L.M. was adjudicated a child in need of assistance. It is also conceded that her custody has been transferred from her parents "for placement pursuant to section 232.102 for at least twelve of the last eighteen months." Therefore, the third element is our main concern at this time.

Iowa Code section 232.102(6) (1985) provides in pertinent part that a CHINA placement of the child apart from its parents shall "be terminated and the child returned to his or her home if the court finds by a preponderance of the evidence that the child will not suffer harm in the manner specified in section 232.2, subsection 6." One of the harms included in the list in subsection 6 is physical abuse.

S.M. argues that there was not sufficient evidence to show that L.M. would suffer any harm if returned to her mother's home. However, S.M. has not changed her living arrangement from the time L.M. was removed from the home. In fact, S.M. and D.W. are now married. S.M. has evidenced little interest in her daughter by way of visits to the residential facility where L.M. is residing. S.M. has refused to cooperate with counselors to improve her parenting skills. S.M. still patently denies that physical abuse occurred in the home and cannot explain the injuries which L.M. suffered there.

We do not doubt that S.M. sincerely wishes to be reunited with L.M. and desires to provide for her child. "However, a parent's interest in the custody and companionship of her children does not outweigh their need to have minimal care and to be free from physical, sexual, and emotional abuse." In Interest of M.H., 367 N.W.2d 275, 280 (Iowa Ct. App. 1985). L.M. cannot continue living in a "parentless limbo." Notwithstanding S.M.'s interests as a mother, the best interest of L.M. mandates a severance of S.M.'s parental rights.

We find that there is clear and convincing evidence that there has been no change from the conditions that led to the CHINA action and that L.M. would

suffer abuse and harm if returned to S.M.'s care and custody. We therefore affirm the trial court's decision.

AFFIRMED.