

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

IN THE INTEREST OF M.M. and P.M.,)
Children,)

Filed November 20, 1986

P.M., NATURAL FATHER,)

6-292
85-1494

164

)
Appellant.

Appeal from the Iowa District Court for Wapello County (No. T2-21) Max
H. Ruschmeyer, District Associate Judge and Gene W. Glenn, Juvenile Referee.

The father appeals from the juvenile court order terminating his parental
rights. **AFFIRMED.**

Steve Gardner, of Kiple, Kiple & Denefe, Ottumwa, for the appellant father.

Thomas J. Miller, Attorney General; Charles K. Phillips, Assistant Attorney
General; John Knight, Assistant Wapello County Attorney for appellee State.

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

OXBERGER, C.J.

In this appeal, the father of two young girls challenges the juvenile court's order terminating his parental rights pursuant to section 232.116(5) of the Iowa Code. He asserts: (1) that section 232.116(6)(e) of Iowa's parent-child termination statute is impermissibly vague in violation of the due process clauses of the Iowa and United States Constitutions; and (2) that the evidence did not support the juvenile court's conclusion that the children *could not* be returned to his custody. We affirm.

I. STANDARD OF REVIEW

Before addressing the appellant's individual contentions, we note that our standard of review is *de novo*. In Interest of K.L.C., 372 N.W.2d 223, 227 (Iowa 1985). When examining the juvenile court's decision in a termination proceeding, our paramount concern is the best interest of the children. In Interest of J.R.H., 358 N.W.2d 311, 317 (Iowa 1984). Although we have recognized a presumption that the best interest of the children will be served by continued parental supervision, this presumption is in no way conclusive, and is tempered when necessary by the State's responsibility to insure that every child receives proper care and treatment. In re Interest of T.D.C., 336 N.W.2d 738, 740 (Iowa 1983); In Interest of K.L.C., 372 N.W.2d at 226.

II. VAGUENESS CHALLENGE TO IOWA CODE SECTION 232.116(6)(e)

The guidelines governing a court's decision in parent-child termination proceedings are set forth in Iowa Code section 232.116. Section 232.116(6) further provides in relevant part as follows:

6. Notwithstanding the provisions of subsections 2 to 5 the court need not terminate the relationship between parents and child if the court finds:

* * *

 - e. That the absence of a parent is due to the parent's admission or commitment to any institution, hospital

or health facility or due to active service in the state or federal armed forces.

Iowa Code § 232.116(6)(e)(1983).

The appellant asserts that section 232.116(6)(e) is void for vagueness because it lacks minimal guidelines governing its application. As such, the appellant contends that state officials are afforded such broad discretion in interpreting and applying the statute that arbitrary and discriminatory parental terminations are inevitable.

We think that the appellant's attack levied against section 232.116(6)(e) is without merit. Initially, we find the void for vagueness doctrine inapplicable in the circumstances of this case. A plethora of judicial decisions have revealed that the gravamen of the void for vagueness doctrine is that potential violators must be given fair notice of what acts are unlawful, and that sufficient guidelines must be set forth so that law enforcement officials are able to apply the law evenly. Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858, 75 L.Ed.2d 903, 909 (1983); Saadiq v. State, 387 N.W.2d 315, 321 (Iowa 1986). The statute at issue does not offend these principles. Unlike a statute providing for the termination of parental rights, the vagueness or overbreadth of which would operate to the detriment of a parent, section 232.116(6)(e) permits a court to refrain from terminating a parent's rights in certain circumstances; a statute of this nature does not implicate the dangers that the void for vagueness doctrine seeks to prevent. See In Interest of M.H., 367 N.W.2d 275, 280-82 (Iowa Ct. App 1985); see also Alsager v. District Court of Polk County, 406 F. Supp. 10, 18-19 (S.D. Iowa 1975), aff'd, 545 F.2d 1137 (8th Cir. 1976).

The appellant maintains that the nature of the statute in question is no different from that considered in Alsager v. District Court of Polk County, 406 F. Supp. 10 (S.D. Iowa 1975), aff'd, 545 F. 2d 1137 (8th Cir. 1976). On the contrary,

we think that the divergent nature of the two statutes further exemplifies our determination that the void for vagueness doctrine is inapplicable in the instant case. In Alsager, certain standards embodied in section 232.41(2) of Iowa's parental termination statute were found unconstitutionally vague. These standards provided for the termination of parental rights where the parents had "refused to give the child necessary parental care and protection," or if the parents were found "unfit by reason of . . . conduct . . . detrimental to the physical or mental health or morals of the child." Alsager v. District Court of Polk County, 406 F. Supp. at 15. The court held that because these standards were susceptible of multifarious interpretations, they failed to inform an ordinary person of what conduct was required or prohibited in order to prevent termination. Id. at 18. In addition, the court found that the vague language used in the statute allowed state officials to subjectively determine on an ad hoc basis what parental conduct was "necessary" or "detrimental", and inhibited parents from engaging in conduct which was constitutionally protected. Id. at 18-19.

By contrast, section 232.116(6)(e) presents none of these dangers. The statute does not preclude potential violator's conduct. The statute permits the court to grant relief in spite of a violator's conduct.

Moreover, when section 232.116(6)(e) is read in conjunction with the other provisions of section 232.116, it is clear that sufficient guidelines have been set forth protecting the parent. Section 232.116(6)(e) simply permits the court to decline from terminating parental rights even though the statutory criteria for termination may have been satisfied when the basis of termination is attributable to the parent's absence because of institutionalization or service in the Armed Forces. See Iowa Code §232.116(6)(e). The court is vested with discretion to decline from applying the statute in circumstances such as the case at bar, where the parent has demonstrable inadequacies independent of his absence.

See In Interest of L.P., 370 N.W.2d 839, 843 (Iowa Ct. App. 1985)(court is not mandated to decline termination under subsection (6), but may if the requirements specified therein are satisfied). More extensive criteria are not required in order to protect the parent's rights because such safeguards are provided in the preceding portions of the statute. See Iowa Code §§232.116(2)-(5).

III. SUFFICIENCY OF EVIDENCE

The appellant also contends that the evidence does not support the juvenile court's decision to terminate his parental rights. In order to justify the termination of parental rights, the State is required to present clear and convincing evidence establishing that the children cannot be returned to the parent's custody for the reasons codified in chapter 232 of the Iowa Code. Iowa Code section 232.116(5) permits termination if:

- a. The children have been adjudicated as children in need of assistance pursuant to §232.96; and
- b. The custody of the children has been transferred from his or her parents for placement pursuant to §232.102 for at least 12 months; and
- c. There is clear and convincing evidence that the children cannot be returned to the custody of their parents as provided in §232.102.

The appellant concedes that the first two prongs of this statutory standard have been satisfied; a determination was made adjudicating that the children were in need of assistance as provided in Iowa Code section 232.96 (1983), and the children were placed outside the home for a period exceeding twelve months. The appellant argues, however, that the record does not establish by clear and convincing evidence that the children could not be returned to his custody as provided in Iowa Code section 232.102. Section 232.102(3)(a)(b) states that:

3. Whenever possible the court should permit the child to remain at home with his or her parent, guardian or custodian. Custody of the child should not be transferred

unless the court finds there is clear and convincing evidence that:

- a. The child cannot be protected from physical abuse without transfer of custody; or
- b. The child cannot be protected from some harm which would justify the adjudication of the child as a child in need of assistance and an adequate placement is available.

We have carefully examined the record, and have found a legion of evidence supporting the juvenile court's conclusion that the appellant's children cannot be returned to his care. The record discloses that in 1983, when the children were adjudicated in need of assistance, the appellant had neglected them and failed to provide necessary medical attention. At that time, both children suffered from severe ear infections, the younger child's condition potentially life-threatening if left untreated. In addition, a number of attempts to improve the appellant's parenting skills and to provide the children with medical care proved ineffective because the appellant habitually failed to keep the appointments. Furthermore, on at least two occasions, the appellant left the children with a babysitter for an extensive period of time; on one of these occasions, he told the babysitter that he would pick the children up in approximately an hour, but did not return for nearly two weeks. Moreover, the record reveals that the appellant has had an extensive history of criminal convictions. At the time of the termination proceeding, he was awaiting parole following his plea of guilty to a burglary charge filed in 1984.

Although the appellant contends that most of his prior problems were alcohol and drug related, and that he has had an opportunity to reform himself during his incarceration, the social worker in charge of the case recommended the termination of his parental rights. In reaching this conclusion, she stressed the contents of the appellant's psychological report. In the report, Dr. Helen Tiaht, the psychologist who evaluated the appellant, stated that the appellant would

need a structured environment in order to function as an adult. In addition, Dr. Tiaht indicated that the appellant "would rather not accept responsibilities" and that "[he] does, indeed, need to complete some other alcohol abuse program. . . ." On the basis of this evaluation and the appellant's prior history, the social worker concluded that the appellant's parenting abilities had not improved. Furthermore, the juvenile court found it significant that the appellant had not sent the children birthday or Christmas cards during his absence, and that the children had forgotten any memory of him. Moreover, the appellant failed to attend a number of scheduled visits arranged prior to the termination proceeding. In light of the above, we cannot say that the court erred in terminating the appellant's parental rights.

AFFIRMED.