

IN THE COURT OF APPEALS OF IOWA

No. 9-677 / 89-1291

FILED

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CLERK SUPREME COURT

IN THE INTEREST OF D.J.B. and K.B., Minor Children

J.M.B., Mother,

Appellant.

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Appeal from the Iowa District Court for Dubuque County,
Charles H. Jacobs, Juvenile Referee.

The mother appeals the decision of the juvenile court
terminating her parental rights to her two children.
REVERSED.

Mark J. Sullivan of Reynolds & Kenline, Dubuque, for
appellant mother.

Thomas J. Miller, Attorney General; Gordon E. Allen,
Deputy Attorney General; Candy Morgan, Assistant Attorney
General; and Jean Becker, Assistant County Attorney, for
appellee State.

Paula M. Stenlund of Naughton, Stenlund & Reilly,
Dubuque, guardian ad litem for children (appellees).

Considered by Donielson, P.J., and Sackett and Habhab,
JJ.

HABEAS, J.

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The mother, J.M.B., appeals the decision of the juvenile court terminating her parental rights to her two children, D.J.B. and K.B.¹ She contends the State failed to meet its burden of proof. We reverse.

In December of 1986, J.M.B. left D.B., Sr. and moved to Dubuque with D.J.B. and K.B. The impetus for this move was D.B., Sr.'s sexual molestation of J.G., J.M.B.'s daughter by a previous marriage. D.B., Sr. had been previously convicted of sexually molesting a seven-year-old girl in 1970. J.M.B. sought the aid of the Department of Human Services (DHS). On March 31, 1987, the children were removed from J.M.B. by ex parte order for temporary removal. The basis for this order was two alleged acts of physical abuse and two allegations of denial of critical care. The first incident of physical abuse occurred on March 23, 1987. J.M.B. threw a cigarette lighter which struck D.J.B. in the face. J.M.B. claimed that she was attempting to scare a cat from the kitchen counter when she accidentally hit D.J.B. The second act of physical abuse occurred on March 25, 1987, when J.M.B. spanked her son, D.J.B., during an intake interview at Families of Northeast Iowa. No injuries resulted from this action, but a social

1. The father, D.B., Sr., has not appealed the termination of his parental rights.

worker was alarmed by J.M.B.'s actions. The two acts of denial of critical care were both observed by a DHS homemaker on March 30, 1987. The homemaker observed through a window D.J.B. melting a plastic toy key on the stove. She also found the home to be without adequate supplies of food.

In May 1987, the children were adjudicated to be children in need of assistance and were placed in foster care. They have remained in foster care continuously since that time. In May 1989, the State filed the present petition to terminate the parental rights of both parents. After a hearing, the juvenile court terminated the parental rights of both parents.

Appellate review of termination proceedings is de novo. In re W.G., 349 N.W.2d 487, 491 (Iowa 1984), cert. denied, 469 U.S. 1222, 105 S. Ct. 1212, 84 L. Ed. 2d 353 (1985). We give weight to the findings of fact of the juvenile court, especially when considering the credibility of witnesses, but we are not bound by those determinations. Id. at 491-92.

Iowa Code section 232.116(1)(e) (1989) permits the juvenile court to terminate the parent-child relationship if the child has been adjudicated in need of assistance, has been placed out of the parent's custody for more than twelve of the last eighteen months, and there is clear and

convincing evidence that the child will suffer harm specified in Iowa Code section 232.2(6) (1989) if returned to the parent. See In re K.L.C., 372 N.W.2d 223, 227 (Iowa 1985).

The State has the burden to prove the allegations of the petition to terminate by clear and convincing evidence. In the Interest of D.T., 418 N.W.2d 355, 356 (Iowa App. 1987). The issue in dispute herein concerns whether there is clear and convincing evidence that D.J.B. and K.B. cannot be returned to J.M.B.'s custody, as provided in Iowa Code section 232.2(6) (1989). Section 232.2(6) provides in pertinent part that:

"Child in need of assistance" means an unmarried child:

* * *

b. Whose parent . . . has physically abused or neglected the child, or is imminently likely to abuse or neglect the child.

c. Who has suffered or is imminently likely to suffer harmful effects as a result of:

* * *

(2) The failure of the child's parent . . . to exercise a reasonable degree of care in supervising the child.

Upon thorough review of the record in this case, we believe there is not clear and convincing evidence that the children would be in imminent threat of those harms detailed in section 232.2(6)(b) and (c) if they were returned to J.M.B.'s care.

While J.M.B. has not been the model parent, it is obvious that she loves her children.² At the time of the termination hearing, J.M.B. had found steady employment and maintained a permanent residence with another woman with whom she works. This roommate would provide baby-sitting services while J.M.B. is working. J.M.B.'s employment, when combined with social welfare benefits, should enable J.M.B. to provide the children with adequate foodstuffs. We additionally note that the record is devoid of any evidence that J.M.B. permitted the children to become malnourished.

During the period the children have been in foster care, J.M.B. has not committed any overt physical act of corporal punishment. Indeed, the State now complains in its brief that J.M.B. is too lax in disciplining the children. We find the State has failed to demonstrate by clear and convincing evidence any nexus between J.M.B.'s lax disciplinary skills and the likelihood that one of the harms enumerated in section 232.2(6) would befall the children.

REVERSED.

Donielson, P.J., concurs; Sackett, J., specially concurs.

2. J.M.B.'s love and caring for her children is demonstrated clearly by her move to Dubuque to prevent sexual molestation of K.B. by D.B., Sr. Ironically, that which J.M.B. sought to prevent was allowed to occur by DHS's permitting D.B., Sr. to have unsupervised overnight visitation with K.B.

SACKETT, J. (specially concurring)

I agree with the majority. There is not clear and convincing evidence these children cannot be returned to their mother.

The mother in this case is poor. She came with her two young children to Dubuque. She left Wisconsin to escape a father who had sexually abused the children. She came without money, furniture, food, family, or friends. Her sole financial resources were aid to dependent families payments and food stamps. Her children were removed from her care without a hearing because (1) she had no furniture, (2) she had inadequate food in the home, (3) she hit a child with a cigarette lighter (probably accidentally), (4) she spanked a child (but left no marks), (5) she screamed at the children in what was described as an emotionally abusive manner, and (6) a child melted a plastic toy on the stove while the mother was talking on the telephone. When the matter of removing the children came on for hearing, the court was anxious to get the State's evidence, and did not appoint an attorney for the mother until after the hearing was over. The mother was given only supervised visitation after removal. She exercised considerable visitation, missed some scheduled

visitation, and was considered not attentive during some visits. She was to attend parenting classes, but attended only six out of eleven. She was to work toward stability. At time of trial she was employed, had saved \$250, and was working toward her GED.

There is no evidence in this case of the children receiving any injury other than a small cut while in their mother's care. They were basically healthy, although the daughter was being treated by a doctor for anemia.

In the past five years in this state we have seen a substantial increase in the number of cases on issues of removing children from family homes and terminating parental rights. Because these cases have only hit our courts in substantial numbers in recent years, we are traversing uncharted waters without the historical direction available to us in many other areas of the law. This increase in cases is generally the result of a push for permanency occasioned by the Adoption Assistance & Child Welfare Act, Pub. L. No. 96-272, 94 Stat. 500 (1980).

I am concerned that we may be putting too much emphasis on termination of parental rights, too much emphasis on removing children from homes, and too little emphasis on assisting troubled families in improving their parenting skills so their children can remain at home.

Removal of a child from his or her home and termination of parental rights are drastic measure. This state has always had a strong sense of the importance of family ties. A desire to preserve the family unit is reflected in the Iowa legislature's rules of construction for chapter 231, which provide a preference for the child's own home. Recent federal legislation tying state eligibility for federal assistance with foster care to the requirement that in each case, reasonable efforts be made to eliminate removal of a child from his or her home. This is not to say removal from the parental home and termination of parental rights should not be utilized in some instances. For some children it is their only chance.

Unfortunately, in this country our direction is too often determined by the flagrant case. Cases involving the severely abused child may be a cause for paranoia about leaving a child in a less-than-perfect home. A large number of cases in which children are being removed and parental rights are being terminated are not flagrant cases. They are instead cases in which parents, as here, do not perform according to guidelines (frequently arbitrary guidelines) as to how parents should perform. It is these situations I am concerned about.

Like this mother, nearly all persons who lose their children in this state are poor. Poverty, as it did here, causes problems in supplying those things society says are

necessary for children--adequate food, shelter, and furniture. Poverty also causes parenting to be more demanding because the poor generally do not have the resources to purchase conveniences to make parenting easier. They cannot hire alternate child care providers. They live in substandard housing and have few modern conveniences.

A large number of families who enter the system are parented by parents who had children when they themselves were children. These parents have problems with supervision, nurturing, and stability. They frequently do not have the benefit of supportive extended families. They are overwhelmed with the responsibilities and demands of parenting. They frequently had improper parenting themselves. Often, as here, they have limited education and poor skills. Many are single women and need assistance in improving their skills.

However, like this mother, I find these parents are frequently criticized for mistakes all parents make. We measure their skills in child care and homemaking by the standards of June and Ward Cleaver. We expect them to have their substandard housing clean and sanitary. We expect the children to behave as good children should. Anything else is criticized. As an example, factors relied upon in large part here were:

1. Mother yelled at children.
2. Mother spanked children.
3. Mother hit child with a cigarette lighter (probably accidentally).

4. Child put a toy in the flame on the stove while the mother was talking on the telephone.

The only physical injury the children had was a minor cut from the thrown cigarette lighter. The children were basically in good health. These types of incidents occur with considerable frequency in many parental homes across Iowa. The State does not get concerned about them when they occur in middle-class homes.

I believe these children, and similarly situated children, should not be removed from their homes. First, I do not find the complaints serious enough to justify removal. But more importantly, because once a child is removed from a parental home, we trigger a series of events that are almost always not beneficial to the child.

When the child is removed from the home, the state becomes the parent. The state usually is not a good parent. I recognize the State of Iowa employs concerned and conscientious persons to administer its programs and is able to recruit, despite the incredible responsibility and poor pay, dedicated foster parents. The State of Iowa has serious failings as a parent. A parent, even an inadequate parent, almost without exception loves his or her children more than anyone else's children. Furthermore, the State cannot do that. The State, in parenting as well as most other assignments it takes, is nearly always somewhat inefficient. In state employment, we are delayed by rules, by changes in personnel, and by procedures.

While in the state's care, the mother was allowed only supervised visitation. The father, who had been convicted of sexually abusing one child and accused of sexually abusing another, was granted unsupervised visitation. There is evidence he sexually abused these children during that visitation.

Nothing has moved very expeditiously. These children have now been in foster care for nearly three years. They continue to be children with special needs. There were no substantial delays, but procedures are slow. The children were removed from their mother's care on March 31, 1987. A termination petition was filed May 3, 1989, a hearing on termination was held June 8 and 9, 1989, and a trial court decree was entered July 26, 1989. Appeal was filed August 23, 1989. Briefing was concluded and the matter was ready for transfer to our court on November 22, 1989. The July 26, 1989, trial court decree made the children orphans. They lost their parents, with no replacements. After our decision, the State may, and probably will, ask for further review by the supreme court. Additional time will pass. Only after this case is not taken for further review or, if taken, the supreme court affirms our decision, can serious reunification efforts take place. If the case is taken for further review and our decision is vacated, then these children can be adopted. There is no assurance they will be adopted.

They are older children with problems. They are not particularly intelligent. They suffer scars from the parental home, foster care, and the system that ultimately makes them adoptable. Maybe they will be lucky and be adopted. If they are adopted, there are no assurances the adoptive placement will be successful.

The premise that we promote a child's best interests by preserving his or her biological family has strong support from well-recognized commentators. See Wald, State Intervention on Behalf of Neglected Children: Standards for Removal of Children, 28 Stan. L. Rev. 623, 638 (1976). See generally Beyer & Mlyniec, Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence, 20 Fam. L.Q. 233, 234-36 (1986).

This case points to the need to encourage efforts to allow children to remain in their homes. The seventh judicial district has a pilot program that addresses this issue. Efforts need to be made to consider such programs on a statewide basis.