IN THE COURT OF APPEALS OF IOWA

No. 1-156 / 90-1431

FILED
JUN 25 1991
CLERK SUPREME COURT

IN THE INTEREST OF L.H. AND J.H., CHILDREN,

F.H., Father, and C.H., Mother,

Appellants,

STATE OF IOWA and GARY D. McKENRICK, Guardian Ad Litem, Appellants.

Appeal from the Iowa District Court for Scott County, John A. Nahra and Margaret S. Briles, Judges.

Parents appeal an order directing their children remain in California. **AFFIRMED AS MODIFIED.** The State and guardian ad litem appeal the refusal of the trial court to terminate parental rights. **AFFIRMED.**

Robert J. Phelps, Davenport, for appellant father.

Murray W. Bell of Newport, Bell & Oxley, Davenport, for appellant mother.

Bonnie J. Campbell, Attorney General, Gordon E. Allen, Deputy Attorney General, and Judy Sheirbon, Assistant Attorney General, for appellant State.

Gary McKenrick of Gomez, May, McKenrick & Kelly, Davenport, guardian ad litem for children (appellant).

Heard by Oxberger, C.J., and Sackett and Habhab, JJ., but decided en banc.

OXBERGER, C.J.

This is a consolidation of two appeals. Appellants F.H. and C.H., Scott County residents, appeal (1) from the adjudication of two of their children, L.H. and J.H. as children in need of assistance, and (2) from the trial court's refusal to return the children to Iowa. Appellants, the State of Iowa, and Gary D. McKenrick, guardian ad litem for the children, appeal the trial court's refusal to terminate the parents' parental rights under Iowa code section 232.116(1)(f).

The parents live in Scott County, Iowa. They had five sons. Three of the children, between two and ten years of age, were living in Scott County with the mother in September 1989. The parents were separated at the time. A fourth child has resided in residential care in Iowa since March 1989. The parents voluntarily surrendered their parental rights to one of their children pursuant to Iowa Code section 232.116 in 1984.

The mother, because of health problems and the need for assistance with parenting, petitioned the Iowa court to appoint her mother, a California resident, guardian of the three children in her care. In September 1989, the children went to California to live with their grandmother. On December 4, 1989, D.H., the middle child, was killed and the grandmother subsequently charged with his murder. Family services in California placed the

surviving children in foster care in California where they remain today.

Wendy Ann Rickman, an abuse and neglect investigator for the Iowa Department of Human Services (DHS), testified as to events leading up to the children going to California. She said she met with the mother in September 1989, following a call to the department that the mother was having problems supervising the children because of health problems. The call, considered an abuse report, was later expunged from the records as unfounded.

Rickman met with the mother and the three children. The mother had recently suffered a light heart attack and was under a doctor's order to remain on bedrest. Rickman called the father and he took the children for three or four days, but the father was unable to continue caring for the children due to his substandard living conditions. Rickman discussed options with the family, including the option of the children going with the grandmother. A short time later, Rickman learned the grandmother had come to Iowa and taken the children back to California. Learning this information, the department staffed the case and found no grounds making the placement an inappropriate choice.

Rickman testified that after she investigated the family she determined the report of abuse or neglect was unfounded. After Rickman learned that the children had gone to California to stay with their grandmother, she

visited with the grandmother by telephone on October 16, 1989, and determined the grandmother was an appropriate caretaker. She asked the grandmother to contact the California department about a possible sexual abuse allegation against the father. Rickman did not follow up with California to verify the contact. Later, the allegations against the father were determined to be unfounded. California documents show two separate children's services investigations of the grandmother's home on October 18, 1989, and November 22, 1989, prior to the child's death. No problems were uncovered.

An investigation following the death of one of the children showed the grandmother had been abusive to the children during their stay with her. After the child's death, DHS was substituted for the grandmother as guardian. A restraining order was also issued to keep the parents from contacting the two children. The mother testified the prosecuting attorney in California told her that if she talked to anyone in California she would be charged with obstructing justice. The parents went to California in January 1990, and were allowed to see the children for only thirty minutes.

On February 13, 1990, Gary McKenrick, an Iowa attorney, was appointed attorney for the children. On the same day, he filed a petition to have the children found to be CINA. The petition alleged the children were in California in the

custody of the California counterpart to Iowa's DHS, and their parents lived in Iowa. The petition also named DHS as the children's guardian. Additionally, the petition alleged:

> The aforenamed children are children in need of assistance as defined by sections 232.2(6)(b) and 232.2(6)(c)(2), Iowa Code (1989), as amended, in that said children, along with their brother, D.H. age 4 years, were placed in the guardianship, care and custody of their grandmother, [T.R.], upon the Petition of their mother who knew or should have known that said [T.R.] was not qualified to serve as Guardian of said children and, in fact, would be likely to physically abuse said children; further in that the parents of the aforenamed children knew that said children were being abused while in the guardianship, care and custody of [T.R.] and took no action to prevent such continuing abuse; all of which resulted in the death of D.H.

Iowa assumed jurisdiction, and a hearing was held in May. On July 3, 1990, the trial court entered an order finding the children to be CINA. The trial court based its decision on its finding the children had suffered harmful effects as the result of conditions created by their parents. The order set a dispositional hearing for July 26, 1990. On May 22, 1990, the father filed a motion to have the children returned to Iowa.

On July 16, 1990, in response to the motion, the court ordered the children returned to Iowa. The children were not returned to Iowa; rather, at the end of July, the attorney and guardian ad litem for the children, who has resisted their return, filed a petition to terminate parental rights. The petition alleged the children's

present domicile was in California, and the children were in foster care under the custody and supervision of the Department of Children Services, County of Los Angeles.

On August 27, 1990, a dispositional hearing was held. The court determined from reports the children were thriving in foster care and it was best the children remain in California until a decision was made in the termination proceedings.

Following a hearing, the trial court refused to terminate the parental rights of C.H. and F.H. in a November 8, 1990, order. The court found the family had struggled with poverty, and the mother had struggled with her health. The court found no clear and satisfactory evidence the parents could not parent the boys. The trial court noted, while the parents are ignorant and poor, that provides no basis for the State to take away their children and to give the children to persons who are better educated and financially more secure. The court pointed out these parents had parented the children from 1984 through 1989 without problems. The court also found there had been no reasonable efforts expended to reunite the family.

Appeals were taken and a Justice of the Iowa Supreme Court ordered the children remain in California pending the resolution of this appeal. The parents ask us to dismiss the adjudication and/or order the children returned to Iowa. The State and guardian ad litem ask us to terminate

the parental rights of C.H. and F.H. with respect to these two boys.

SCOPE OF REVIEW. Appellate review of termination proceedings and CINA 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); In re D.L., 410 N.W.2d 201, 202 (Iowa App. 1986). We give weight to the findings of fact of the juvenile court, especially when considering the credibility of witnesses, but are not bound by them. Id. at 491-92.

The primary concern in proceedings of this type is the best interest of the child. Iowa R. App. P. 14(f)(15); In re Dameron, 306 N.W.2d 743, 745 (Iowa 1981); In re D.L., 410 N.W.2d at 202.

> We look to the child's long-range, as well as immediate, interests. We consider what the future 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 the parent is capable of providing. Our statutory termination provisions are preventative as well as remedial. They are designed to prevent probable harm to a child.

In re R.M., 431 N.W.2d 196, 199 (Iowa App. 1988) (citing to Dameron, 306 N.W.2d at 745); see also In re A.C., 415 N.W.2d 609, 613 (Iowa 1987).

An interest exists in maintaining the family unit, but that interest is not absolute and may be forfeited by certain parental conduct. In re N.H., 383 N.W.2d 570, 574 (Iowa 1986)(citation omitted).

THE CINA PROCEEDINGS. The father has challenged the jurisdiction of the Iowa court to entertain a CINA action as to these two children. The father raises several arguments in his appeal, but has not shown where these jurisdictional arguments were raised at the trial court level. We consider only his argument as to subject matter jurisdiction, which can be raised at any time. See generally In re Marriage of Bolson, 394 N.W.2d 361, 363 (Iowa 1980); Christie v. Rolscreen Co., 448 N.W.2d 447, 450 (Iowa 1989).

The children's mother initiated court proceedings in September 1989 to appoint her mother as guardian of the children. When one of the children died while in the grandmother's care, the mother applied for termination of the guardianship. The court then appointed DHS to be the children's guardian. DHS in turn provided for continued placement of the children in California.

California has never had custody of these children. Since the termination of the grandmother's guardianship of the children, the State of Iowa has retained custody of them. The status of the children is further exemplified by a letter, dated July 3, 1990, sent to an Iowa court from the Children's Services Division of the County of Los Angeles. The letter states in part:

> Pursuant to our telephone conversation of July 2, 1990, enclosed is a copy of a letter from Larry Flesburg, Social Worker V, Iowa Department of Human Services, outlining the goals and responsibilities the State of Iowa intends to assume with regard to these minors.

> These minors are currently under a temporary detention order of the Juvenile Court of Los Angeles County, California. They are not dependents of the Court. We have been deferring to any actions which your court might undertake in this matter.

(emphasis added).

Unquestionably, when the children were placed in the guardianship of their grandmother they were domiciled in Iowa. The children's parents were domiciled in Iowa at that time, and the domicile of a child follows that of his or her parent. See In re Guardianship of Skinner, 230 Iowa 1016, 1020, 300 N.W. 3-4, (1941). "Persons who procure and accept an appointment as guardian of a minor child are subject to the control and supervision of the court as the superior guardian." In re Guardianship of Stewart, 369 N.W.2d 820, 824 (Iowa 1985)(citation omitted). When the children's grandmother initially secured her appointment as guardian of the children, she submitted to the jurisdiction of the court entering the guardianship order. See In re Guardianship of Ankeney, 360 N.W.2d 733, 736 (Iowa 1985).

Iowa never transferred the custody of these children to California. Because the Iowa courts have possessed superior control and supervision over these children since their grandmother was originally appointed their guardian, the Iowa courts also have subject matter jurisdiction over the current proceedings which involve the control and supervision of the children.

In a ruling dated July 2, 1990, the trial court found the parents of L.H. and J.H. were unable to care for the children immediately prior to the institution of the guardianship proceedings in September 1989. Further, the trial court found both parents had reason to believe the children's maternal grandmother was not a fit caretaker for the children and the parents had reasonable cause to believe the children were being abused while in her care. Lastly, the trial court found both children suffered harmful effects as a result of conditions created by their parents. *Upon our de novo review of the record*, we agree. Therefore, we affirm the trial court's decision declaring both children to be CINA as set forth and defined by Iowa Code section 232.2(6)(c)(2).

In a dispositional order dated August 27, 1990, the trial court stated "it is not advisable to disrupt the children's present placement pending the hearing on the Petition to Terminate Parental Rights." Therefore, the trial court ordered the children remain under the direction of DHS and in their present foster home in California. The trial court also ordered DHS to immediately prepare and present to the court a Case Permanency Plan detailing how DHS intended to facilitate involvement between the parents and the two children.

Subsequently, the Petition to Terminate Parental Rights was denied. In the ruling denying the petition, the trial court stated:

> It is the policy of the law of the State of Iowa that reasonable efforts must be used to preserve the parental relationship before the Court terminates. There have been no such reasonable efforts in this case, and this Court cannot and will not terminate without such efforts being made, now, under the present circumstances, not 1981 to 1984 circumstances.

In a Ruling on Motion For Return of Children and Supplemental Order to Dispositional Order, written December 3, 1990, the trial court ordered, among other things:

> The Department of Human Services shall require the custodian of the children in the State of California to begin servicing the children with the purpose of reuniting the children with their parents as soon as possible. The short-term goal shall be an extended visit of the children with their parents at the end of the 1990-91 school year. That plan shall be in writing and submitted to this Court not less than thirty days from the date of the filing of this opinion.

Additionally, the trial court noted, with great displeasure, DHS had not submitted a case permanency plan detailing how it intended to facilitate involvement between these children and their parents which had been ordered to be immediately prepared and presented to the court in the August 27, 1990 dispositional order.

Iowa Code section 232.102(6)(1989) states in part:

> If the court orders the transfer of the custody of the child to the department of human services or other agency for placement, the department or agency shall submit a case permanency plan to the court and shall make every effort to return the child to the child's home as quickly as possible consistent with the best interest of the child.

DHS has failed to make reasonable efforts to reunite this family. Further, we do not believe reasonable efforts can be made if the children continue to reside in California. Bringing the family physically together in some type of situation would seem to be one of the most initial steps in reuniting this family. Therefore, we order the children returned to Iowa as soon as possible and placed in appropriate foster care as near to their parents as possible. Further, we order DHS to immediately prepare and present to the district court a permanency plan with the goal of family reunification. Lastly, we order a dispositional hearing be held within two weeks of the children's return to Iowa.

We find the Iowa courts have the authority and duty to bring these children back to Iowa so meaningful steps toward family reunification can begin. The orders set out above are intended to facilitate the reunification of this family.

TERMINATION PROCEEDINGS. The State contends the trial court erred by failing to terminate the parental rights of C.H. and F.H. with respect to these two boys. We affirm the trial court on this issue. The trial court found there was not sufficient evidence to terminate. The court found, among other things, a termination petition was premature because there was no permanency plan and no attempt had been made to preserve the family unit. We agree.

In light of the previous section of this opinion in which we find that reasonable steps have not been taken to reunite this family, we affirm the trial court's denial of the petition to terminate the parental rights of the parents of J.H. and L.H.

The father challenges the constitutionality of Iowa Code section 232.116(1)(f), under which termination was sought, on several grounds. Because we have affirmed on other grounds, we need not address these constitutional issues.

We affirm the refusal to terminate.

AFFIRMED AS MODIFIED. AFFIRMED.

Donielson, Schlegel, Hayden, and Habhab, JJ., concur; Sackett, J., concurs in part, and dissents in part.

SACKETT, J. (concurring in part and dissenting in part)

I concur in part and dissent in part. I agree with the majority that the State has not made the requisite showing to terminate parental rights.

I also agree with the majority that reasonable efforts have not been advanced to help this family unify. However, unlike the majority, I am unable to order these children returned to Iowa. I do not find under this record the Iowa courts have jurisdiction of the children.

The father challenged the jurisdiction of the Iowa court to entertain a child in need of assistance action. The father contends the Iowa court did not have jurisdiction to find the children to be children in need of assistance. The father did not show where the jurisdiction arguments were raised at the trial court level. I therefore do not consider his argument except as to subject matter jurisdiction, which can be raised at any time. See generally In re Marriage of Bolson, 394 N.W.2d 361, 363 (Iowa 1980); Christie v. Rolscreen Co., 448 N.W.2d 447, 450 (Iowa 1989).

If the father had not challenged jurisdiction, I would have considered it on my own motion. While hindsight is frequently better than foresight, the nearly eighteen months that have transpired with no effort having been made to reunite the family while the children have established substantial bonds to their California foster parents,

raises a serious question why and on what basis Iowa decided to commence child in need of assistance proceedings for two children who had established residence in California, over 1,700 miles away, with a guardian who was a resident of California. If it were agreed between the states Iowa was to handle the procedures, there is no valid reason why the children were not immediately returned to Iowa. The children never having been returned to Iowa, I find we are without jurisdiction to entertain a child in need of assistance proceeding.

Because of the bonding that has taken place with the California foster parents, a move to Iowa at this point will be traumatic for these children. Clearly, decisions about returning the children to Iowa have been colored by evidence from California that there is a good adjustment in the foster home and the foster parents want to adopt the children.

Child in need of assistance proceedings are provided for under Iowa Code sections 232.61 through 232.108 (1989). They are a special proceeding. In re Long, 313 N.W.2d 473, 475-76 (Iowa 1981). Section 232.61, directed to jurisdiction, contains no language to expand an Iowa court's jurisdiction to children residing beyond our borders. Section 232.67, Legislative findings - purpose and policy, talks only of "Children in this state."

The juvenile court is the exclusive forum for proceedings leading to a child in need of assistance adjudication. In re Marriage of Snyder, 276 N.W.2d 402, 406 (Iowa 1979).

There is no statutory direction to use child in need of assistance proceedings for children in custody of another state. I can reach no conclusion but that subject matter jurisdiction under sections 232.61 to 232.108 is dependent upon the child or children who are the subject matter of the proceeding residing in this state.

The State suggests jurisdiction may come from section 232.62. I reject this argument. Section 232.62 deals only with venue that is in what county a court with personal and subject matter jurisdiction may hear and determine a case. See Blacks Law Dictionary 1396 (5th ed. 1979).

Neither is section 598A applicable, it being limited to child custody matters. See Iowa Code § 598A.1., which provides in applicable part:

> The general purposes of this chapter are to:
>
> 1. Avoid jurisdictional competition and conflicts with courts of other states in matters of child custody . . . . (emphasis added).

Our court has been clear in separately defining the subject matter jurisdiction of section 232. See Snyder, 276 N.W.2d at 406 (trial court could not order placement of child under context of section 598 that had been found child in need of assistance under section 232.61(1)); In re

Marriage of Carrico, 284 N.W.2d 251, 255 (Iowa 1979) (district court does not possess subject matter jurisdiction to terminate parental rights in a dissolution action; Iowa Dep't of Social Servs. v. Blair, 294 N.W.2d 567, 569-70 (Iowa 1980) (district court had no authority to order involvement of Dep't of Social Service in dissolution action).

I recognize proceedings in California will create hardships for these parents who live at the poverty level. But such an argument does not confer jurisdiction. I am also reminded in assessing this issue it was the parents who created the situation in transferring custody of their children to a California resident and sending the children to California to live. What has happened here certainly is an argument against this court attempting to pursue a child in need of assistance proceeding when the children are in the custody of a distant state. Meaningful reunification efforts are not possible.

There are no easy answers. I share my fellow judges' concern about the eighteen months during which the State of Iowa has assumed jurisdiction but has made no efforts to reunite this family.

I would affirm the refusal to terminate. I would direct the child in need of assistance petition be dismissed in sixty days to allow California adequate time to proceed to obtain custody of the children in a similar proceeding in their state.