IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

IN THE INTEREST OF C.R. and C.L.R.,	)	
Minor Children.	)	Filed September 30, 1987
G.O., Natural Mother,	)	7-256 / 87-79 197
Appellant.	)	

Appeal from the Iowa District Court for Howard County (No. J640, J641), James L. Beeghly, Judge.

The natural mother appeals from the termination of her parental rights of C.R. and C.L.R., her minor children. **AFFIRMED.**

Henry L. Elwood of Elwood & Elwood, Cresco, and Bruce Lundy Butler, Des Moines, for natural mother-appellant and children.

Thomas J. Miller, Attorney General; Valencia Voyd McCown, Assistant Attorney General; and Joseph Haskovec, County Attorney, for the State.

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

DONIELSON, P.J. **198**

The natural mother appeals from the termination of her parental rights of C.R. and C.L.R., her minor children. The mother's arguments are: 1) the termination of parental rights based on Iowa Code sections 232.116(3) and (5) was statutorily and constitutionally infirm due to insufficient notice to the mother; 2) the court erred in finding grounds for termination under section 232.116(3) without a finding of physical abuse by a parent; 3) prior placement under section 232.102 is necessary for termination pursuant to section 232.116(5); 4) the evidence does not show abandonment of the children by the mother; 5) the evidence does not show the mother received or was offered services to correct the circumstances which led to the abuse; and 6) the evidence does not show the children could not be returned to the custody of the mother. We affirm.

G.O. is the natural mother of C.L.R., born in 1979, and C.R., born in 1980. The natural father is not involved in the appeal. On July 5, 1984, the Department of Human Services made an application for temporary removal of the children, and the juvenile court issued ex parte orders for temporary removal on the same date. This was due to a report of multiple bruises on C.R. On September 28, 1984, the children were adjudicated to be children in need of assistance. The mother visited the children several times until December 1984. From then until the hearing in February 1986, she had no contact with the children or the Department. The Department petitioned for the termination of G.O.'s parental rights. The juvenile court terminated the mother's parental rights based on Iowa Code sections 232.116(2) and (3) (1985), and the district court adopted its findings and conclusions. This appeal followed.

On appeal, we review parent-child terminations de novo. In Interest of K.L.C., 372 N.W.2d 223, 227 (Iowa 1985). We give weight to the fact findings

of the trial court, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7). Central to a determination of this nature are the best interests of the child. In Interest of Dameron, 306 N.W.2d 743, 745 (Iowa 1981). Intrinsic to the evaluation of a child's best interests is an examination of the parent's past performance, from which valuable insight may be gleaned as to future quality of care the parents are able to provide. In Interest of O'Neal, 303 N.W.2d 414, 423 (Iowa 1981). To justify termination of parental rights, the court must find by clear and convincing evidence proof of the statutory grounds. Iowa Code § 232.117(2) (1985).

G.O.'s first argument is that she was not given notice, pursuant to Iowa Code section 232.112, that termination of her parental rights was being based upon the grounds set forth under Iowa Code sections 232.116(3) and (5) and hence, the proceeding to terminate parental rights was statutorily and constitutionally infirm. The only notice the mother received concerned abandonment under Iowa Code section 232.116(2). The State replies that G.O. waived proper notice because her attorney did not object at the hearing and so there was no error preservation.

"Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must set forth the alleged misconduct with particularity." In re Meyer, 204 N.W.2d 625, 626 (Iowa 1973), citing In re Gault, 387 U.S. 1, 33, 87 S. Ct. 1428, 1446, 18 L. Ed. 2d 527, 549 (1967).

We find G.O.'s first argument to be without merit. First, the district court in adopting the juvenile court findings, determined that the evidence supported termination of parental rights on two grounds, one being section 232.116(2) (abandonment), and the other being section 232.116(3) (previous adjudication of physical abuse and services offered to correct the situation which

led to the abuse). G.O. was given notice as to the abandonment grounds. The fact the court also found an alternative ground on which to terminate parental rights does not now give the mother the right to assert lack of notice. Second, G.O. did not object at the juvenile hearing when the State indicated at the hearing that it was seeking termination under both sections 232.116(2) (abandonment) and 232.116(5) (harm which would justify the adjudication of the child as a child in need of assistance). Nor did G.O. object in her request for review submitted to the district court that she did not have adequate notice with regard to the juvenile court's finding that both sections 232.116(2) and (3) warranted termination of parental rights. G.O.'s objection is not timely; and, as such, she has failed to preserve error regarding the issue of proper notice.

Second, G.O. argues that there cannot be termination of parental rights under section 232.116(3) without a finding of physical abuse by a parent. G.O. contends that it was her boyfriend, and not she, who abused the children. The State replies that a parent does not actually have to abuse a child; it is enough if she permits the child to be abused or omits to protect the child.

Under Iowa Code section 232.116(3), termination of the parent-child relationship may be terminated if the court finds that one or both parents has physically abused the child, and the court has previously adjudicated the child to be a child in need of assistance after finding the child to have been physically abused as a result of the acts or omissions of the parent or parents, and there is clear and convincing evidence that the parents were offered services to correct the situation which led to the abuse.

"Physical abuse" as defined by the child in need of assistance statute pursuant to Iowa Code section 232.2(6)(b) is "any nonaccidental physical injury suffered by a child as a result of the acts or omissions of the child's parent, ..."

Iowa Code § 232.2(38) (1985). See also Iowa Code § 232.68(2) (1985); In the Interest of W.G., 349 N.W.2d 487, 492 (Iowa 1984).

G.O.'s boyfriend in the case at hand has had a history of abusing C.R. and C.L.R. Experts testified that G.O. was impulsive, nonassertive, dependent on her boyfriend, and endured personal abuse herself. It was their opinion that the children's safety would be in danger if G.O. continued to associate with her boyfriend. G.O. has refused to correct the environment in which the children live and has allowed the numerous abusive acts inflicted by her boyfriend onto her children to continue. In addition, we note the record (Department of Human Services reports) reveals that G.O. herself has engaged in acts of physical abuse toward her children. G.O. also admitted to excessive hard spanking of the children.

Thus, because of both G.O.'s direct acts of abuse toward her children and her omissions to act in correcting the abusive acts toward her children insofar as her boyfriend is concerned, we find G.O.'s second argument to be without merit.

Third, there was no dispositional hearing under section 232.102; G.O. claims such a hearing is necessary for termination under section 232.116(5). The trial court in adopting the juvenile court's ruling found:

> First, the attorney for the mother raises a procedural issue in his trial brief in that the Court did not comply with Section 232.102(6) because no review hearing was held within six months of placement in foster care. This is a procedural defect in these proceedings, however, this Court has taken the matter under advisement and concludes that 232.102(6) is not jurisdictional and therefore is not prejudicial to the parents. The review hearing is waived when not timely raised prior to the case being submitted for decision by the Court.

We agree with the trial court's analysis. In addition, the lack of a dispositional order should not defeat the termination of parental rights and allow the children's

futures to remain unsettled for another year longer. In re Interest of L.P., 370 N.W.2d 839, 841 (Iowa App. 1985).

Fourth, G.O. states that the record does not reflect by clear and convincing evidence abandonment of the children by her.

Iowa Code section 232.116(2) allows the court to order termination of parental rights if the court finds clear and convincing evidence that the child has been abandoned. Section 232.2(1) defines "abandonment of a child" as follows:

> . . . means the permanent relinquishment or surrender, without reference to any particular person, of the parental rights, duties, or privileges inherent in the parent-child relationship. Proof of abandonment must include both the intention to abandon and the acts by which the intention is evidenced. The term does not require that the relinquishment or surrender be over any particular period of time.

Abandonment does not require total desertion before parental rights may be terminated. In the Interest of Goettsche, 311 N.W.2d 104, 105 (Iowa 1981).

In the immediate case, G.O. had been without contact with her children from December 1984 until the date of the hearing in February 1986, a period of fourteen months. There is no dispute as to lack of contact during this period of time. G.O. travelled around the country in a semi truck with her boyfriend during most of 1985. She never sent the children any cards or presents at the foster parents' home. The Department of Human Services representatives testified that G.O. did not maintain contact with them. In December 1984 G.O. wrote a letter stating she felt the best interests of the children would be served by placing them with the courts of the State of Iowa. G.O. contends in her brief that her loss of contact with her children was due to the Department's "pathetic" responses; specifically, that psychological evaluations of G.O. and in-home therapy were inadequate; that the Department wanting G.O. to separate from her boyfriend was unreasonable; and that the Department's counselling services were inadequate and unworkable, thereby causing G.O. to break off

contact with her counselors. G.O. asserts that because of her boyfriend, she could not accept calls and that her mail was intercepted by him, thereby creating the problem of loss of contact with the Department. We cannot find that the Department's actions were "destructive and indefensible" as G.O. contends. We note that the majority of G.O.'s problems concerning these allegations stem from her boyfriend. For the Department to require G.O. to terminate her relationship with her boyfriend in the children's best interests seems very logical and reasonable to us.

We find that there is clear and convincing evidence that G.O. did abandon her children by abdicating her parental rights. Accordingly, the trial court properly terminated G.O.'s parental rights on the ground of abandonment.

G.O.'s fifth and sixth arguments are that there was no clear and convincing evidence to show she received or was offered services to correct the situation which led to the abuse or that the children could not be returned to her custody. G.O. claims the Department had a duty to facilitate visitation, which it did not do, and which led to the circumstance that she did not see her children for fourteen months. The State responds that the evidence supported the termination of parental rights.

Iowa Code section 232.116(5) provides that the court may order termination of parental rights if the court finds that (1) the child has been adjudicated a child in need of assistance, (2) the custody of the child has been transferred from his parents for placement pursuant to section 232.102 for at least twelve of the last eighteen months, and (3) there is clear and convincing evidence that the child cannot be returned to the custody of his parents because the child cannot be protected from physical harm or some harm which would justify the adjudication of the child as a child in need of assistance.

We find from the record that there is clear and convincing evidence that all three elements of Iowa Code section 232.116(5) have been proved. With regard to the first criteria to meet under section 232.116(5), G.O. does not take issue with the children being adjudicated children in need of assistance. With regard to the second element of section 232.116(5), we find that G.O. has not had custody for at least twelve of the last eighteen months. With regard to criteria (3) of section 232.116(5), we find that there is clear and convincing evidence that the children cannot be returned to the custody of G.O. because the record discloses that the children are likely to suffer harm if returned to her. The physical abuse that the children have already suffered is saddening; to submit them to further injury due to G.O.'s complete lack of parental care would be additional trauma to them which we cannot allow. G.O. has consistently failed to intercede between her boyfriend and the children, knowing her boyfriend has engaged in abusive acts upon the children. G.O. has not followed through with a counseling program. Efforts were made to return the children to her, although to no avail. She failed to maintain contact with the Department. G.O. argues she was dependent on her boyfriend for food, shelter, and transportation and for the Department to request separation from him was unreasonable. However, the evidence is overwhelming as to the detrimental effect that her boyfriend had on the children due to his hostility and antisocial behavior. The record discloses that G.O. was offered services, but they were denied. Evaluations and interviews of G.O. were completed. The Department facilitated visits between the children and G.O. We find the efforts to be reasonable on the part of the Department to reunite G.O. with her children. G.O. testified that her boyfriend is no longer a part of her life. However, we take note she has also said this on previous occasions and reunited with him. She further

testified at trial she still loved her boyfriend and would continue to trust him alone with her children.

Thus, based on G.O.'s lack of ability to protect her children from abusive situations, and keeping in mind that the children's best interests are central to our determination in this matter, we find there is clear and convincing evidence that the children cannot be safely returned to their mother.

We therefore affirm the trial court in its termination of parental rights under both Iowa Code sections 232.116(2) and 232.116(3); and in addition we find termination of her parental rights is also warranted under Iowa Code section 232.116(5).

AFFIRMED.