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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN THE INTEREST OF J.L.P.,
A Child,

J.P , Natural Mother,

Appellant.

Filed February 25, 1987

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6-455
86-730

Appeal from the Iowa District Court for Audubon County (No. Juvenile 298) - Gordon C. Abel, District Associate Judge.

The natural mother of a four-year-old girl appeals from the juvenile court order terminating her parental rights pursuant to Iowa Code section 232.116(5) (child in need of assistance who has been transferred from parents' custody for at least 12 months cannot be returned there). **AFFIRMED.**

Rita Harmening Pedersen of Mumma Law Firm, Jefferson, for appellant.

Thomas J. Miller, Attorney General; Charles K. Phillips, Assistant Attorney General, and Francine O'Brien Anderson, Assistant County Attorney, for appellee State

Robert D. Nelson of Rasmussen & Nelson, Exira, for appellee R.P., the natural father.

Heard by Donielson, P.J., and Snell and Hayden, JJ.

The natural mother of a four-year-old girl appeals from the juvenile court order terminating her parental rights pursuant to Iowa Code section 232.116(5). On appeal, the natural mother asserts that (1) there was not sufficient evidence to support termination under section 232.116(5); (2) even if there was sufficient evidence to support termination under section 232.116(5), the juvenile court should have declined to terminate under Iowa Code section 232.116(6), since her absence from the home was due to incarceration; and (3) that her constitutional rights to due process were violated because she did not receive effective assistance of counsel. We affirm.

J.P. and R.P. are the natural parents of J.L.P., born on February 4, 1982. J.L.P. lived with her parents and her half-sister, C.D., until December 20, 1982, when J.L.P. and C.D. were hospitalized. J.L.P. was diagnosed as suffering chronic dermatitis, ring worm, and moderate to severe bronchitis. C.D., however, was less fortunate--C.D. arrived at the hospital in a coma, suffering severe and irreversible brain damage as a result of severe blows to the head. C.D. died several days later. J.P. entered a plea of guilty to the crime of voluntary manslaughter in C.D.'s death and was sentenced to prison for a term not to exceed ten years.

In January 1983, J.L.P. was adjudicated a child in need of assistance based on Iowa Code section 232.2(5)(b), (c)(2), and (e) (1981) (physical abuse or neglect, lack of supervision, and necessity of medical treatment). J.L.P.'s custody was transferred to the department of human services; she was placed with R.P.'s parents. In July 1983, J.P. and R.P. were divorced. In July 1985, the State of Iowa filed a petition to terminate J.P. and R.P.'s parental rights pursuant to Iowa Code section 232.116(5) (child in need of assistance who has been transferred from parents' custody for at least 12 months cannot be returned there).

Trial was held in August 1985. J.P. was represented by appointed counsel. In November 1985, J.P. wrote the trial judge claiming that her counsel had failed to call any of the witnesses she had identified as helpful to her case. In April 1986, the juvenile court entered an order which terminated J.P.'s parental rights (the termination petition against R.P. had apparently been dismissed), left custody of J.L.P. with the department of human services for continued placement with R.P.'s parents, and made R.P. J.L.P.'s guardian. J.P.'s letter was not mentioned in the order. J.P. has appealed from the order.

On appeal, we review parent-child terminations de novo. In Interest of K.L.C., 372 N.W.2d 223, 227 (Iowa 1985). While we give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, we are not bound by them. Iowa R. App. P. 14(f)(7).

In its petition the State alleged, and the juvenile court found, that grounds for the termination of J.P.'s parental rights existed under Iowa Code section 232.116(5) (1985). Section 232.116 outlines six grounds upon which termination of parental rights may be authorized. Generally, if one of these grounds is established by clear and convincing evidence, the termination will be upheld. In Interest of K.L.C., 372 N.W.2d at 237. We find that clear and convincing evidence exists requiring termination on the basis of Iowa Code section 232.116(5) (1985).

The lower court specifically found that J.L.P. was a child in need of assistance under the provisions of Iowa Code sections 232.2(5)(b), (c)(2), and (e) (1981). Iowa Code section 232.2(5) defines the conditions pursuant to which a court may find a child in need of assistance. Section 232.2(5) provides in pertinent part:

> 5. "Child in need of assistance" means an unmarried child:

* * *

b. Whose parent, guardian or other custodian 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, guardian, or custodian to exercise a reasonable degree of care in supervising the child.

* * *

e. Who is in need of medical treatment to cure, alleviate, or prevent serious physical injury or illness and whose parent, guardian or custodian is unwilling or unable to provide such treatment.

Once the court has determined that a child is in need of assistance, the court may terminate parental rights pursuant to section 232.116(5) if the child has been adjudicated in need of assistance, has been placed out of the parent's custody for more than twelve months, and there is clear and convincing evidence that the child cannot be returned to the parental home because definitional grounds of a "child in need of assistance" still exist.

The paramount concern in a determination of this nature is the best interest of the child. In Interest of J.H., 358 N.W.2d 311, 317 (Iowa 1984). While we recognize the importance of the integrity of the family unit and that the child's interests may best be served in the care of his parents, such principles are not absolute, but may be defeated by parental conduct. In Interest of Dameron, 306 N W.2d 743, 745 (Iowa 1981). In evaluating the child's best interests, we necessarily consider the child's long-range as well as immediate interests. Id. Intrinsic to this evaluation is an examination of the parent's past performance, from which valuable insight may be gleaned as to the future quality of care the parents are able to provide. In Interest of O'Neal, 303 N.W.2d 414, 423

(Iowa 1978). In addition, the State, as parens patriae, has the duty to assume that every child within its borders receives proper care and treatment and must intercede when parents have abdicated that responsibility. In Interest of K.L.C., 372 N.W.2d at 226.

Turning to the record, we find it replete with evidence of J.P.'s inability to properly care for J.L.P. and that J.L.P. would likely suffer imminent harm if returned to her mother's custody. We do not believe it is necessary to recite all of the substantial testimony of the State's witnesses in this matter. It is sufficient to note all of the social workers and medical experts who testified at trial unanimously agreed that returning J.L.P. to her mother would result in severe physical and/or emotional damage to J.L.P. Dr. Daniel Schor of the Iowa City Child Development Clinic stated that if returned home J.L.P. would "be at high risk for death at the hands of her mother; that if she were not killed by her mother, there would be a near certainty of significant irreversible damage to her psychological and emotional health and a significant probability as well of physical injury to her." Dr. John Garfield expressed deep concern about J P.'s lack of understanding of child behavior. Dr. Garfield was particularly concerned about the fact that J.P. apparently blamed C.D. for her own death and did not accept any responsibility for C.D.'s death. Dr. Garfield further noted that if J.L.P.'s placement was destabilized, one could expect various manifestations of insecurity, confusion in acquisition of behavioral rules, and confusion in her identity formation. Additionally, J.L.P.'s paternal grandmother testified that because of J.P.'s inability to control her anger, she would be concerned if J.L.P. was returned to J.P.

We further note that during visits with J.L.P. at the correctional facility, J P. was not able to control J.L.P. and did not use those visits to establish a relationship wherein she could discipline J.L.P. without use of physical force.

While C.D. and J.L.P. were under J.P.'s care, both children were found to be dirty and were often left unattended for hours at a time, sometimes locked in a car. J.L.P. suffered from a severe case of dermatitis, and J.P. evidently neglected to apply medicine prescribed to alleviate the disease. C.D. suffered numerous bruises throughout her body, and this physical abuse eventually led to her death. From these facts alone we believe the State provided clear and convincing evidence that J.P.'s parental rights should be terminated pursuant to section 232.116(5).

J.P. contends, however, that even if there was sufficient evidence to support an order for termination, the court should have declined to terminate under section 232.116(6). Section 232.116(6) provides that the court need not terminate the parent-child relationship if the court finds that the absence of a parent is due to his or her commitment to any institution. Armed with the facts provided at trial, the court rightfully concluded that it would be in J.L.P.'s best interest that the parent-child relationship be terminated. Section 232.116(6) is not a mandatory obligation upon the court, but is rather a discretionary decision belonging to the trial court. This section merely provides that in some cases the fact that a parent is imprisoned need not justify a termination of the parent-child relationship. Since J.P. did not exhibit any proficient parenting skills during J.L.P.'s visits with J.P., and because J.L.P. was in need of a permanent and stable placement as quickly as possible, we do not believe the court erred in refusing to exercise its discretion under section 232.116(6).

J.P. lastly argues that her constitutional right to due process was violated because she did not receive effective assistance of counsel, since her court-appointed counsel failed to call any of the witnesses she had identified as helpful to her case. We find no merit in such a contention.

In In Interest of D.W., 385 N.W.2d 570, 579 (Iowa 1986), the Iowa Supreme Court noted that in situations such as the present due process requires counsel appointed under a statutory directive to provide effective assistance. Citing the standard set forth in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 674, 694 (1984), the court stated that a party claiming ineffective assistance must show (1) that counsel's performance was deficient, and (2) that actual prejudice resulted. D.W., 385 N.W.2d at 580. Our scrutiny of counsel's performance must be highly deferential, and there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 689, 104 S. Ct. at 2066, 80 L. Ed. 2d at 694-95. The claiming party must overcome the presumption that under the circumstances, the challenged action might be considered sound trial strategy. Id. We need not, however, determine whether counsel's performance was deficient before examining the prejudice component of the Strickland test. 466 U.S. at 697, 104 S. Ct. at 2069-70, 80 L. Ed. 2d at 699.

In the present case, we find that J.P. has presented no evidence supporting her claim of ineffective assistance of counsel, for we can find no prejudice resulting from J.P.'s counsel's performance. Under Strickland, the test for prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

Concerning the testimony of witnesses which may have been favorable to J.P., the failure to call such witnesses may have legitimately been a trial tactic on the part of defense counsel. Defense counsel may have determined that any testimony from such witnesses, who were mostly prison officials, would not be sufficient to refute the testimony offered by Dr. Schor and Dr. Garfield

concerning J P 's propensity to inflict child abuse Furthermore, the possible testimony of the prison officials could not be guaranteed as being favorable to J P Whatever reasons for defense counsel's failure to call witnesses favorable to J P , we find that J P has failed to show that but for such a failure, the outcome of this case would have been different The evidence was overwhelming in this case, and we therefore hold that J P 's claim of ineffective assistance of counsel must fail

AFFIRMED.