IN THE COURT OF APPEALS OF IOWA

No. 3-055 / 92-1327

FILED
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CLERK SUPREME COURT

IN THE INTEREST OF M.B. and S.B., Minor Children,

K.D.B., Mother,
Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Gerald W. McGee, Judge.

The mother appeals the juvenile court's termination of her parental rights to her two children. **AFFIRMED.**

F. David Eastman of the Eastman Law Office, Clear Lake, for appellant.

Bonnie J. Campbell, Attorney General, John M. Parmeter, Special Assistant Attorney General, and Judy Sheirbon, Assistant Attorney General, for appellee State.

Mathew F. Berry, Clear Lake, attorney and guardian ad litem for M.B.

James J. Brandt of Pappajohn, Shriver, Eide & Nicholas, P.C., Clear Lake, attorney and guardian ad litem for S.B.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ.

SCHLEGEL, J.

K.D.B. (Kathy),[1] the natural mother of S.B (Sarah), born March 17, 1985, and M.B. (Martin), born January 4, 1988,[2] appeals the juvenile court's termination of her parental rights to both children. Kathy contends: (1) clear and convincing evidence did not exist pursuant to Iowa Code section 232.116(3)(c) (1991) to terminate her parental rights to Sarah; (2) Sarah's best interests will not be served by terminating Kathy's parental rights; (3) clear and convincing evidence did not exist pursuant to Iowa Code sections 232.116(3)(c) and (d) (1991) to terminate her parental rights to Martin; and (4) Martin's best interests will not be served by terminating Kathy's parental rights to Martin.

Between 1985 and 1990, child abuse investigators reported several founded denial of critical care and physical abuse incidents, naming Kathy as the perpetrator. In one of these incidents, Kathy's boyfriend, R.L. (Roger),[3] physically abused Martin causing permanent injuries to Martin. The physical abuse resulted in a skull fracture, a punctured lip, bruises to Martin's buttocks, genitals, chest and arms, and brain damage. This abuse further resulted in the hospitalization of Martin from

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[1]This name is used for clarity only and is not the natural mother's real name.

[2]These are not the children's real names.

[3]This is not the person's real name.

March of 1990 until May of 1990 and led to Martin being institutionalized in a residential facility for the severely and profoundly disabled.

Sarah was also removed from Kathy's custody in March of 1990, and she was later adjudicated to be a child in need of assistance pursuant to a stipulation between the parties. The court ordered that Sarah be evaluated by a child psychiatrist, and Sarah was diagnosed as suffering from post-traumatic stress disorder. The court also ordered Kathy to undergo psychiatric, sexual abuse and parenting evaluations.

In March of 1991, Kathy pleaded guilty to two counts of child endangerment. She was sentenced to consecutive terms of two years on the charges. At the time of this appeal, Kathy was awaiting consideration of her appeal on those convictions.

Numerous services have been offered to Kathy since the children were removed from her home. She has been permitted visitation with both children since that time and has exercised visitation on a periodic basis. A hearing was held concerning the State's petition to terminate the parental relationship between Kathy and her two children, Sarah and Martin. Following the hearing, the court ordered the parental relationship terminated, and Kathy appeals. We affirm.

The two fathers of these children were served with notice of the pendency of these proceedings, but the record

reflects the fathers had little or no contact with the children and failed to appear at the termination hearing at which their parental rights and relationships with the children were terminated. The fathers have not appealed the court's ruling.

Termination was sought in this case in accordance with Iowa Code section 232.116(1)(e) (1991), which provides:

> . . . [T]he court may order the termination of both the parental rights with respect to a child and the relationship between the parent and the child on any of the following grounds:
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> (e) The court finds that all of the following have occurred:
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> (1) The child is four years of age or older.
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> (2) The child has been adjudicated a child in need of assistance pursuant to section 232.96.
>
> (3) The custody of the child has been transferred from the child's parents for placement pursuant to section 232.102 for at least twelve of the last eighteen months, or for the last twelve consecutive months and any trial period at home has been less than thirty days.
>
> (4) There is clear and convincing evidence that at the present time the child cannot be returned to the custody of the child's parents as provided in section 232.102.

The juvenile court determined all four elements had been satisfied and found clear and convincing evidence that the children could not be returned to Kathy's custody.

Appellate review of proceedings to terminate a parent-child relationship is de novo. The reviewing court may review the facts as well as the law and adjudicate the

parents' rights anew. In re Dameron, 459 N.W.2d 489, 493 (Iowa 1990); Iowa R. App. P. 14(f)(7) (1991). Our primary concern in determining whether termination of parental rights is appropriate is the best interests of the child. The best interests of the child are determined by looking at the child's long-range as well as immediate interests and by considering what the future likely holds for the child if that child is returned to his or her parents.

Insight for that determination is gained from evidence of the parents' past performance, for that performance may be indicative of the quality of the future care that the parent is capable of providing. In re L.L., 459 N.W.2d 489, 493-494 (Iowa 1990); In re Dameron, 306 N.W.2d at 745. The State has the duty to see that every child within its borders receives proper care and treatment and must intercede when parents abdicate that responsibility. In re I.L.G.R., 433 N.W.2d 681, 689 (Iowa 1988).

In the present case, the parties stipulated that elements one, two and three of Iowa Code section 232.116(1)(e) (1991) had been met. The issue decided by the juvenile court was whether the provisions of element four were proven. Section 232.116(1)(e)(4) requires " . . . clear and convincing evidence that at the present time the child cannot be returned to the custody of the child's parents as provided in section 232.102." Section 232.102 provides for the transfer of custody of children adjudged to be children in need of assistance and provides

for the children's placement following the transfer of custody.

Here, the evidence was clear that the children could not be returned to the custody of Kathy at the time of the termination hearing. All the evidence produced by all parties indicated that Kathy would not be ready to maintain custody of the children until more than a year after the hearing. However, this estimate is not unequivocal. In view of the fact that Kathy was sentenced to two consecutive two-year terms in prison, such a time schedule would be impossible if those sentences are upheld on appeal. Furthermore, after considering the evidence received in the termination hearing, we seriously question whether Kathy will be able to parent these children in her home in the foreseeable future regardless of the outcome of the pending criminal charges against her.

Kathy has a propensity to associate herself with men who have a violent disposition. The evidence indicates that perhaps her present companion is a more mild-mannered and responsible person who might lend some orderliness to Kathy's life. However, these children should not be required to await the resolution of their mother's convictions and sentences in view of Kathy's questionable record of performance in the past.

The placement of Martin for adoption may be difficult given his physical disabilities. It is unclear whether he knows his mother at all and, although there seems to be a

relationship of sorts between Martin and his maternal grandfather, we question Martin's ability to meaningfully recognize any person with whom he comes into contact. Martin is profoundly and permanently disabled and shows no signs of becoming a normal-functioning person.

We belive Sarah should be placed in an adoptive home where she can finally enjoy the security of a stable family and experience the reliability of responsible parents. She should not be required to await the possible maturity of her mother. Sarah has been without stability in her life too long. "The crucial days of childhood can not be suspended while parents experiment with ways to face up to their own problems." In re A.C., 415 N.W.2d 609, 613 (Iowa 1987).

While the State mandates that the integrity of the family unit should be protected whenever possible, In re I.L.G.R., 433 N.W.2d at 689, the statutory presumption that a child's best interests will be served by leaving the child with the child's parent is not conclusive. In re L. L., 459 N.W.2d at 494.

These children should not be required to subject themselves to the possibility of an abusive relationship with their mother or her companions. The evidence in this case persuasively indicates that these children cannot now--nor in the foreseeable future--be returned to the custody and care of their mother. Accordingly, the juvenile court was correct in terminating the parent-child

relationship between these children and their mother and their respective fathers.

AFFIRMED.

Habhab, J., concurs; 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 concur with the majority's decision to affirm the order terminating the parental rights to Sarah, born March 17, 1985. While I agree with the majority that Sarah should be placed in a responsible and secure adoptive home, I also realize there are no assurances she will be. Sarah is now eight years old. She suffers from post-traumatic syndrome, is not trusting, and is prone to extreme behavior. She is a very difficult child to parent. Sarah had problems when taken from her mother's home. She has not substantially improved and for some periods has regressed in foster care. Sarah's first foster family had problems with her and asked to be relieved of her care. Sarah has had problems in the second foster home and her foster mother testified to the extreme frustration Sarah has caused. The second foster mother has another foster child and at times has cared for as many as six children in her home. While Sarah's second foster mother is a conscientious person, it is obvious she has not been able to give Sarah much assistance with her problems. Sarah knows and is bonded to her mother. She welcomes her mother's visits. It appears part of Sarah's frustration has been caused by the fear that her mother would be taken

out of her life. There was expert testimony at trial that Sarah would grieve for her mother if parental rights were terminated.

If Sarah is put in an adoptive home, it will be yet another adjustment. Because Sarah is going to be such a difficult child to parent, there may be a scarcity of adoptive homes available to her. Or, like a number of children who share her circumstances, Sarah may be placed for adoption but not adopted when prospective adoptive parents try to work with her problems. Or she may grow to adulthood as an orphan and as a ward of the state.

I do not carry any false hope that termination will provide many solutions to Sarah's problems. But Sarah has been in foster care for three years and statutorily termination is the mandated step, and there is clear and convincing evidence supporting the State's petition. Therefore, I agree with the majority's decision to terminate her parental rights.

Sarah's mother is poor, may have limited abilities, and has suffered abuse as a child. Her major parenting deficiency which had disastrous results for her children was her choosing abusive mates and her inability to protect her children from them. Sarah's mother loves her children. She probably is the only person who does.

The case plan took Sarah from her mother's care, restricted her access to Sarah, and assumed Sarah's mother could improve her parenting skills through a service of

counseling sessions and classes. And it did not work. Perhaps we need to start directing our resources into program that focus on keeping parent and child in closer contact and working with the parent with hands-on parenting. The closer bond would give the parent a greater incentive and the child would not suffer the separation anxiety a child experiences when separated from a parent. While it is easy to be angry with Sarah's mother and want to punish her because she is a bad parent, Sarah would have been better served if we could has assisted Sarah's mother in becoming an adequate parent.

I do not concur with the majority's decision to terminate parental rights to Michael. Michael has suffered profound injuries at the hand of his mother's boyfriend. Michael is in a care facility. He requires substantial around the clock care and needs a feeding tube. There is evidence no person in the situation Michael is in has left a nursing facility. His mother cares about him and makes a drive nearly halfway across the state to visit him with regularity. While it is questionable whether Michael knows her, he has very affirmative responses to the human contact. There was testimony he <u>might</u> be adoptable and someone <u>might</u> take him in their home. No one could care for Michael without substantial assistance and it would be difficult to find a private home where his twenty-four hour a day needs would be served as adequately as his needs are being served in a residential nursing facility. The

majority, by terminating the mother's parental right, is severing Michael from the one person in his life who loves him and will be a constant source.

Furthermore, the majority is cutting off Michael's parents obligation to support him. There probably is no support flowing from his parents now, but it is probable either parent or both parents may in the future have the ability to make a financial contribution to the cost of his care.

I would reverse the order terminating Michael's parental rights.