IN THE COURT OF APPEALS OF IOWA

No. 0-688 / 00-969
Filed January 10, 2001

IN THE INTEREST OF K.U.,
Minor Child,

M.M., Mother,
Appellant.

FILED
JAN 10 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Mills County, Kathleen A. Kilnoski, District Associate Judge.

The mother appeals from the juvenile court order terminating her parental rights to one of her children. **AFFIRMED.**

Drew H. Kouris, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, for appellee-State.

Matthew G. Woods of the Peters Law Firm, P.C., Glenwood, for minor child.

Heard by Zimmer, P.J., and Hecht and Vaitheswaran, JJ.

VAITHESWARAN, J.

Melissa appeals a juvenile court order terminating her right to parent Kaymie. We affirm.

I. Background Facts and Proceedings

Kaymie, born on February 18, 1993, was the product of a short union between Melissa and Scott. Scott was in and out of prison and half-way houses throughout Kaymie's life and there is no evidence he had any contact with Kaymie.

Melissa lived with or married and divorced several men. She had three children in addition to Kaymie. Custody of the oldest, Dominick, was awarded to his father. Custody of the third child, Kristal, was awarded to her father. The fourth child, who was a few months old at the time of these termination proceedings, remained in Melissa's care at the time of the termination hearing.

Just before these proceedings began, Melissa lived with Kaymie, a man named Dan, Dan's adult daughter Tammy, Tammy's former husband Bob, and their three children. In March 1998, Kaymie reported she had been sexually abused by Dan and Bob. The juvenile court adjudicated Kaymie a child in need of assistance under Iowa Code section 232.2(6)(d) (imminent likelihood of sexual abuse). Kaymie was placed in foster care where she remained throughout the remaining proceedings.

In October 1999, the State petitioned to terminate Melissa's parental rights as to Kaymie under Iowa Code sections 232.116(1)(c) (physical or sexual abuse by acts or omissions of parents), (e) (child cannot be returned to parent's custody) and (h) (physical or sexual abuse by acts or omissions of

parents)(1999) for her failure to protect the child from a sexual perpetrator.[1] The district court refused to terminate Melissa's rights under Iowa Code sections 232.116(1)(c) or (h), concluding that certain statutory prerequisites were not satisfied.[2] However, the court found clear and convincing evidence to support termination of Melissa's parental rights under Iowa Code section 232.116(1)(e).[3] This appeal followed.

II. Termination

Melissa contends the State failed to prove the fourth element of Iowa Code section 232.116(1)(e) which provides termination may occur where "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."[4]

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[1] The original petition referred to Iowa Code sections 232.116(1)(c) twice and to Iowa Code section 232.116(1)(h) once. At the termination hearing, the guardian ad litem moved to amend the petition to make reference to subsection (e). The juvenile court granted the motion, noting the omission was a typographical error.

[2] The juvenile court specifically concluded:

> Kaymie was adjudicated CINA under section 232.6(d), based upon the court's determination that she had been sexually abused by members of her household, Daniel and Robert. Neither Daniel nor Robert is Kaymie's biological or adoptive parent, as defined at 232.2(39). Although the department's investigation was founded for Melissa's failure to protect Kaymie from abuse, [Melissa's] omission was not included in the CINA petition. Thus, Kaymie was not adjudicated CINA because of her mother's failure to protect her from sexual abuse. The termination petition must fail under this ground. (last names omitted).

[3] The court also terminated Scott's parental rights as to Kaymie. He does not appeal.

[4] The remaining three elements are:

> (1) The child is four years of age or older.
> (2) The child has been adjudicated a child in need of assistance pursuant to section 232.96.
> (3) The child has been removed from the physical custody of the child's parents for at least twelve of the last eighteen months, or for the last

We review termination proceedings de novo. *In re S.R.*, 600 N.W.2d 63, 64 (Iowa App. 1999). Our primary concern is the best interests of the child. *Id.*

Melissa appears to contend her rights cannot be terminated for failure to protect against sexual abuse under subsection (e) of Iowa Code section 232.116(1) because the juvenile court expressly concluded her rights could not be terminated for that reason under subsection (c) of the statute. We disagree. Iowa Code section 232.116(1)(c) requires an express finding that the court has "previously adjudicated the child to be a child in need of assistance after finding the child to have been physically or sexually abused or neglected as the result of the acts or omissions of one or both parents." The court could not rely on this provision to terminate Melissa's rights because the court had previously adjudicated Kaymie a child in need of assistance based on the likelihood she would be sexually abused, and not based on Melissa's failure to protect her from sexual abuse.

Iowa Code section 232.116(1)(e), in contrast, is much broader than section 232.116(1)(c). It authorizes termination for reasons set forth in Iowa Code section 232.102 which, in turn, authorizes removal where the child cannot be protected from physical abuse or "some harm which would justify the adjudication of the child as a child in need of assistance." Under this provision, a parent's rights could be terminated for failure to supervise a child. Iowa Code § 232.2(6)(c)(2) (defining child in need of assistance). The juvenile court found

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twelve consecutive months and any trial period at home has been less than thirty days.

such a failure to supervise. Based on our de novo review of the record, we find clear and convincing evidence to support this decision.

As early as 1994, the Department of Human Services issued a founded child abuse report against Melissa for denying critical care to Kaymie when she failed to use an apnea monitor as directed. The Department issued a second founded report for failing to provide adequate shelter.

In 1997, the Department again found Melissa denied critical care after Kaymie was discovered having sex with her half-brother Dominick. Both Dominick and Kaymie had been sexually abused prior to this time, Kaymie by one of Melissa's former husbands. Shortly after this incident, Kaymie was discovered performing sex acts on one of the children living in the home. Early the following year, Kaymie stated she had been sexually abused by Dan and Bob. She was removed from the home in March, 1998.

Melissa did virtually nothing to protect her young daughter from these recurring incidents of sexual abuse. After Kaymie was seen outside performing a sex act on a younger child, Melissa advised a Department worker Kaymie could have been sexually abused in the past. However, she took no steps to ensure such abuse would not recur. When Kaymie disclosed several months later that she had been abused by Dan, a Department social worker asked Melissa to develop a safety plan for Kaymie to prevent Dan from having access to her. Melissa refused, stating she did not believe Dan had touched Kaymie. She also refused to attend or participate in virtually all parenting sessions the Department scheduled for her, stating she did not trust her caseworker. Melissa additionally participated on only a limited basis in therapy designed to address issues relating

to her own abuse and dependency, despite evidence suggesting her history affected her ability to parent appropriately.

Melissa also did little to afford Kaymie a stable and secure home environment. For example, she engaged in serial relationships which resulted in frequent moves. The moves often disrupted therapy and other services provided by the State. Melissa also failed to support Kaymie when Kaymie disclosed she had been abused by Dan, electing instead to believe Kaymie had recanted and Dan's denial was truthful because he passed a polygraph test. We are not convinced Kaymie recanted. The record reveals that when a public health nurse told Kaymie she would have to return to foster care so no one would hurt her, she responded by expressing a desire to see her mother and by stating, "[t]hey don't hurt me." At best, this statement reflects Kaymie's continued attachment to her mother rather than a recantation of the sexual abuse that occurred in the home. Additionally, the fact Dan passed a polygraph test is immaterial in the face of other compelling evidence that Kaymie was repeatedly sexually abused by more than one person while in her mother's custody.

We agree with the juvenile court the State proved by clear and convincing evidence Kaymie could not be returned to Melissa's home. We accordingly affirm the termination of Melissa's parental rights as to Kaymie under Iowa Code section 232.116(1)(e).

AFFIRMED.