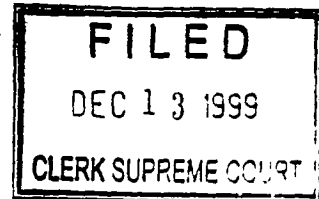


IN THE COURT OF APPEALS OF IOWA

No. 1999-302 (9-532) 98-1719
Filed December 13, 1999



IN THE INTEREST OF C.B. and G.L., Minor Children,

H.W., Mother,
Appellant.

Appeal from the Iowa District Court for Woodbury County, Patrick H. Tott,
Associate Juvenile Judge.

A mother appeals the juvenile court order terminating her parental rights to her
minor children. **REVERSED.**

Martha M. McMinn, Sioux City, for appellant.

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

Joseph Kertels, Sioux City, guardian ad litem for minor children.

Considered by Sackett, C.J., Zimmer J., and Schlegel, S.J.*

***Senior Judge assigned by order pursuant to Iowa Code § 602.9206 (1999).**

SCHLEGEL, S.J.

This is one of a long line of cases making its way through the appellate process that demonstrates, once again, the tragedy associated with addictions to alcohol and drugs.

Iowa law, as enunciated by this court and the Iowa Supreme Court makes the outcome of such appeals a very certain conclusion. It is crystal clear the perception, in any such case, that what is in the best interests of the child or children outweighs any other consideration. And, while our *perception* of what is in the child's best interest may be uncertain or clearly wrong in a given case, most often, acting upon that perception is the best we can do.

No judge: trial judge, juvenile judge, or appellate judge or justice derives any joy from the duty imposed upon him or her to treat with issues that result in the termination of parent-child relationships. The pain resulting to the parent, and often to the child, is not something any judge would willingly inflict, given any other proper choice.

H.W. is the mother of the two minor children in this case. C.B., a boy, was born on **February 11, 1992**, and is age seven years. G.L., a girl, was born on **August 19, 1995**, and is now four years of age. **The two children were removed from their mother's custody on or about August 10, 1996. That removal resulted from the mother's assault of an older child with a belt, leaving multiple injuries.** The mother was in a highly intoxicated state and threatened to kill the child. The mother had an

admitted history of alcohol and chemical substance abuse. The incident resulted in her conviction of child endangerment and jail time and probation. A condition of her probation was her completion of chemical dependency treatment and parenting classes.

On October 10, 1996, the children were adjudicated to be in need of assistance pursuant to Iowa Code sections 232.2(6)(a), (b), (j) and (n) (1995). The basis of the adjudication was the mother's abuse and neglect of the children and the mother's ongoing alcohol/drug abuse.

The disposition hearing on the CINA matter was finally held in March 1997. At that time, G.L. was residing with her maternal grandmother in Louisiana, and C.B. was living with his maternal aunt in Sioux City, Iowa. The whereabouts of the mother, H.W., were unknown. She failed to cooperate with any of the services offered by the department of human services. She left Iowa to avoid facing a probation revocation hearing on her child endangerment conviction. She was ordered to have no contact with the children until she had contacted the Iowa Department of Human Services. There was evidence of her failure to abide by the no-contact order of the court, and there was evidence of her continued abuse of alcohol.

Throughout the period from March 1997 until a review/permanency hearing in March 1998, H.W. failed to carry out any remedial plans or programs of the Iowa Department of Human Services to completion. Shortly before the hearing in March 12, 1998, she returned to Iowa. She participated in that hearing. She claimed

that she had not used drugs for a long time. She faced a revocation hearing because of violations of her probation on March 30, 1998. She was in an abusive marriage at the time. The judge of the juvenile court ordered the mother have no visitation with her children pending the next hearing.

By the time of the next hearing, in May 1998, H.W. had entered a relapse program and was attending her sessions regularly. She had attended only one of her individual therapy sessions. She was psychologically evaluated and showed signs of schizoid personality disorder and dependency. She was attending Alcoholics Anonymous and Narcotics Anonymous meetings regularly, and she was submitting random urinalyses, which were negative. She was obtaining a divorce and was employed at Hardee's restaurant. Because the State filed a petition for termination of the parent-child relationship on the same date as the May hearing, the court found that it was not in the best interest of the children to resume visitation. (The no-visitiation order had been imposed again on March 12, at the time of the review/permanency hearing.)

The hearing on termination was held on July 9, 1998. At that time, H.W. had been involved in chemical dependency treatment since April 1998. Her counselor testified ~~that the mother~~ had made progress, but the children could not be returned to her unless she and the children were placed in a highly structured setting. H.W. had been employed at Interbake Foods for approximately one month and had secured her own apartment the week before the hearing. She was separated from her husband.

The court found the circumstances that had led to the adjudication continued to exist, that the children could not be returned to the custody of their parents within a reasonable period of time, that the parents had failed to maintain any significant or meaningful contact with these children during the previous six months, and that the parents had not made reasonable timely efforts to resume care of the children. The court terminated the parental rights of the mother pursuant to code sections 232.116(1)(c), (d), (e), (g) and (k), which provide:

1. Except as provided in subsection 3, the 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:

...

c. The court finds that both of the following have occurred:

(1) 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, or the court has previously adjudicated a child who is a member of the same family to be a child in need of assistance after such a finding.

(2) Subsequent to the child in need of assistance adjudication, the parents were offered or received services to correct the circumstance which led to the adjudication, and the circumstance continues to exist despite the offer or receipt of services.

...

d. The court finds that all of the following have occurred:

(1) The child has been adjudicated a child in need of assistance pursuant to section 232.96.

(2) The child has been removed from the physical custody of the child's parents for a period of at least six consecutive months.

(3) There is clear and convincing evidence that the parents have not maintained significant and meaningful contact with the child during the previous six consecutive months and have made no reasonable efforts to resume care of the child despite being given the opportunity to do so. For the purposes of this subparagraph, "significant and meaningful contact" includes but is not limited to the affirmative

~~assumption by the parents of the duties encompassed by the role of being a parent.~~ This affirmative duty, in addition to financial obligations, requires continued interest in the child, a genuine effort to complete the responsibilities prescribed in the case permanency plan, a genuine effort to maintain communication with the child, and requires that the parents establish and maintain a place of importance in the child's life.

...

e. The court finds that all of the following have occurred:

(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 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.

...

g. The court finds that all of the following have occurred:

(1) The child is three years of age or younger.

(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 six months of the last twelve months, or for the last six consecutive months and any trial period at home has been less than thirty days.

(4) There is clear and convincing evidence that the child cannot be returned to the custody of the child's parents as provided in section 232.102 at the present time.

...

k. ~~The~~ court finds that all of the following have occurred:

(1) ~~The~~ child has been adjudicated a child in need of assistance pursuant to section 232.96 and custody has been transferred from the child's parents for placement pursuant to section 232.102.

(2) ~~The~~ parent has a severe, chronic substance abuse problem, and presents a danger to self or others as evidenced by prior acts.

(3) There is clear and convincing evidence that the parent's prognosis indicates that the child will not be able to be returned to the custody of the parent within a reasonable period of time considering the child's age and need for a permanent home.

~~The mother, H.W.~~, claims the State has failed to show all of the elements exist to allow ~~the~~ termination of her parental rights. She claims she was willing to participate in services and would be willing to participate in more services. Further, she claims reasonable efforts to reunite her with her children have not been made. She claims she has made improvement in dealing with her chemical dependency and that such improvement was grounds for continuing this case as a child-in-need-of-assistance case instead of terminating her parental rights. She also claims she has steadfastly sought visitation with her children since her return to Iowa, and such visitation has been totally refused by the Iowa Department of Human Services.

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*, 306 N.W.2d 743, 745 (Iowa 1981). However, weight is to be accorded the findings of the juvenile court, particularly with respect to the credibility of the witnesses. *In re L.L.*, 459 N.W.2d 489, 493 (Iowa 1990); *In re R.R.K.*, 544 N.W.2d 274, 275 (Iowa App. 1995); Iowa R. App. P. 14(f)(7).

The primary concern in a termination proceeding is the best interests of the child. *In re R.R.K.*, 544 N.W.2d at 275. Those best interests are to be determined by looking ~~at the child's~~ long-range as well as immediate interests. The court is to consider what the future likely holds for the child if that child is returned to his or her parents. Insight for that determination is to be gained from evidence of the parent's

~~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 at 493-94.

The court and the Iowa Department of Human Services deprived H.W. of any visitation of her children after her return to Iowa. Upon two or three occasions after her return, she sought visitation from the department and the court. The court, in its ruling following a review/permanency hearing on May 21, 1998, (the ruling being dated June 4, 1998) in responding to a request that she be given rights of visitation of the two children, stated: "In light of the short amount of time between this hearing and the termination hearing, it would not be in the children's best interests to resume visitations until the outcome of the termination hearing is known." This was a continuation of the situation that was ordered by the court in its order with respect to the review/permanency hearing on March 12, 1998, where the court stated: "IT IS FURTHER ORDERED that there be no visitations between the children and their mother, [H.W.], pending the next hearing."

Whether there would have been any benefit or detriment from such visitation is purely speculative. There is very little in the record to assist any prediction as to what its ~~effect~~ would have been. It would appear that such visits might have helped the court ~~in determining~~ how H.W. and her children interacted. Such visits would have needed to be supervised until some determination was made as to the continuation or termination of the parental relationship.

The juvenile court, in its termination of parental rights order, observed:

With [H.W.'s] history, the court strongly believes that should the children be returned to her anytime in the near future, the stress of having to care for them would make it extremely likely that she would relapse. The events of the last couple of months give reason to have hope for [H.W.'s] future, however, a couple of months of sobriety weighed against 15 years of dependency makes that hope be cautious at best.

It appears that some of the things the department of human services and the court hoped for were, for the first time, being tried by H.W. With that kind of positive conduct, it seems the elements necessary to terminate the relationship between these children and their mother were not shown by clear and convincing evidence. The court's speculation as to the possibility of relapse by H.W. could have been either proven correct or shown to be incorrect with a continuation of the status quo for a short period of time, coupled with a program of supervised visitation. If, as the court speculated, H.W. was likely to relapse, it would have had little further effect upon the children to continue in the current placement for a few months more. The record shows that although the children have not been in the custody of their mother for an extended period, they have been well cared for and were not in danger during the time of their being placed in foster care or relative care.

There is no record that the actions of the mother have caused any mental or physical injury to the children. In the case of *In re J.R.*, 478 N.W.2d 409 (Iowa App. 1991), this court held the State failed to establish by clear and convincing evidence

that the child suffered, or would suffer any mental injury as a result of his mother's acts so as to justify termination. *Id.* at 413.

This is not a case such as *In re A.C.*, 415 N.W.2d 609 (Iowa 1987), where the court held the evidence was overwhelming that, "because of the mother's tragic condition, the children were physically neglected and abused. The children were ill-fed and were for the most part compelled to rely on one another for routine care and feeding." *Id.* at 611.

More than a year has elapsed since the court's order terminating the parental relationship between H.W. and these two children. One is tempted to say that at this late date it would be unwise to reverse the court's termination order and to remand the case for further proceedings to make an effort to determine if further services might be instituted to reunite these children to their mother. There is inadequate evidence in this record to support the termination under the statutory provisions cited by the court. The ruling of the court is devoid of reasoning to support the statutory provisions. Intervening events may well justify the juvenile court's observations about the mother's performance with respect to her addictions. However, we are required to affirm or reverse on the basis of the evidence before the court below. Under the record, there is insufficient evidence to justify termination of the parental relationship between H.W. and these children.

REVERSED.

Sackett, C.J., concurs; Zimmer, J., dissents.

ZIMMER, J. (dissenting)

I respectfully dissent. I believe there is ample evidence in this record to support termination under the statutory provisions cited by the trial court.