IN THE COURT OF APPEALS OF IOWA

No. 6-428 / 96-0064

FILED
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CLERK SUPREME COURT

IN THE INTEREST OF C.M., C.M., and J.M., Minor Children,

K.M., Mother,
Appellant.

Appeal from the Iowa District Court for Des Moines County, Gary J. Snyder, District Associate Judge.

Mother appeals termination of her parental rights. **AFFIRMED.**

Kent W. Lewis, Burlington, for appellant.

Thomas J. Miller, Attorney General, Charles K. Phillips, Assistant Attorney General, Angela R. McAvoy, Legal Intern, and Ronald E. Robertson, County Attorney, for appellee State.

Alan N. Waples of Wittkamp & Waples, Burlington, guardian ad litem, for minor children.

J. Bryan Schulte of Bauer, Schulte, Hahn & Swanson, Burlington, for father.

Considered by Sackett, C.J., and Habhab and Streit, JJ.

HABHAB, J.

The appellant mother appeals the termination of her parental rights to her three children.[1] She argues: 1) there was not clear and convincing evidence to support the termination; 2) the State's exhibits one and two consisted of hearsay and were improperly admitted; 3) the testimony of one of the State's witnesses exceeded the scope of his expertise; and 4) the juvenile court should have found termination would be detrimental to the children under section 232.116(3)(c). We utilize de novo review in determining if there is clear and convincing evidence to support the termination of parental rights. *See In re S.A.*, 502 N.W.2d 23, 25 (Iowa App. 1993). We affirm.

Kim is the mother of Chad, born November 10, 1986; Chase, born September 27, 1987; and Jessica, born February 13, 1991. The father, Rex, is an alcoholic with a history of domestic violence. Kim has been incarcerated numerous times because of theft charges and probation violations. At the time of the termination hearing, she was a resident of the Iowa Correctional Institute for Women in Mitchellville. Her tentative discharge date is 1997 and early release is unlikely due to her many disciplinary problems.

The children first came to the attention of the Department of Human Services (DHS) in 1991 after Kim left the children with an inappropriate caretaker without

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[1] The parental rights of the children's father were also terminated, but he does not appeal.

adequate food or clothing. The children were adjudicated children in need of assistance in January 1992 and placed in Rex's care in February 1992. In April 1993, the children were placed in foster care as a result of Rex's arrests for domestic abuse assault and for operating a motor vehicle while intoxicated.

Kim's last visit with the children was in April 1994. At that time she was expecting her probation was again going to be revoked. Thereafter, she sent occasional cards and letters to the children.

A petition to terminate parental rights was filed in October 1994. On January 30, 1995, Kim wrote to DHS asking that the children be brought to Mitchellville for visitation. DHS refused the request because it believed it would be detrimental to the children.

Kim's parental rights were terminated in December 1995 pursuant to Iowa Code sections 232.116(1)(b) (abandonment or desertion), (d) (children previously adjudicated CINA, out of parent's custody for at least six months, and no meaningful contact maintained), (e) (child four years or older, previous CINA adjudication, out of parent's custody for twelve months, and cannot presently be returned), and (g) (child three years or younger, previous CINA adjudication, out of parent's custody for at least six months, and cannot presently be returned).

I. Clear and Convincing Evidence. Kim challenges whether there was clear and convincing evidence to support a termination of her parental rights. A child's

rights and needs are paramount in termination proceedings. *In re S.A.*, 502 N.W.2d at 25. The primary concern is the best interests of the children.

> We look to the child's long-range, as well as immediate, interests. We consider what the future holds for the child if returned to his or her parents. Insight for this determination can be gained from evidence of the parent's past performance, for that performance may be indicative of the quality of the future care the parent is capable of providing. Our statutory termination provisions are preventative as well as remedial. They are designed to prevent probable harm to a child.

In re R.M., 431 N.W.2d 196, 199 (Iowa App. 1988) (citations omitted).

Kim's incarceration at the time of the termination hearing made it impossible for her children to be returned to her as she would be unable to care for them and provide for their needs. If returned to her, the children would continue to be children in need of assistance under sections 232.116(1)(e) and (g).

Kim was incarcerated from approximately April to July 1993, the time period during which her children were placed in foster care. She was reincarcerated from August to September 1993 for a violation of her probation. At the end of 1993, she moved to Iowa City where she resided until approximately April 1994. Visitation with her children could not be facilitated during her residency in Iowa City. Kim was reincarcerated in August 1994 when her probation was revoked.

From the end of 1992 until the time of the termination hearing, Kim was incarcerated approximately half of the time. Because of her frequent incarcerations and decision to move to Iowa City, she was unable to maintain significant and

meaningful contact with her children as defined in section 232.116(1)(d).[2] While Kim may have been genuinely interested in her children, it was solely because of her own conduct that she was unable to maintain significant and meaningful contact with them.

Given the sufficiency of the evidence to support termination on the basis of sections 232.116(1)(d), (e), and (g), we need not reach the question of whether Kim's lack of contact with her children due to her incarceration amounts to desertion as defined by the code.[3] We also need not address Kim's argument there was insufficient evidence to prove "abandonment," as the juvenile court did not base its termination of parental rights on that particular ground.

II. State's Exhibits 1 and 2. Kim argues exhibits one and two contained hearsay and were improperly admitted. The Iowa Code provides a specific exception

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[2] *"[S]ignificant 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.

Iowa Code § 232.116(1)(d)(3) (emphasis in original).

[3] *"Desertion"* means the relinquishment or surrender for a period in excess of six months of the parental rights, duties, or privileges inherent in the parent-child relationship. Proof of desertion need not include the intention to desert, but is evidenced by the lack of attempted contact with the child or by only incidental contact with the child.

Iowa Code § 232.2(14) (emphasis in original).

for the admission of hearsay evidence.[4] A review of exhibit one reveals it contains a DHS report to the court, a case permanency plan, and a quarterly progress report. Each of these documents was properly admissible under section 232.96(6). Exhibit two consisted of eight separate documents. The DHS addendum to its report to the court, the two letters from DHS, and the two hospital reports regarding Chad were all admissible under section 232.96(6).

The remaining documents (report of foster care review board and two letters from Kim to DHS) do not appear to fall within the hearsay exception of section 232.96(6). However, there was testimony by both Kim and the caseworker about the letters written by Kim. The admission of hearsay evidence is harmless where the facts sought to be proven were otherwise properly admitted through other testimony or evidence. *See Miller v. Bonar*, 337 N.W.2d 523, 528 (Iowa 1983). Contrary to Kim's assertions, the admission of the report of the foster care review board does not so taint the record as to require a reversal of the juvenile court's ruling. In reviewing this case de novo, we have disregarded the report of the foster care review board and

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[4] A report, study, record, or other writing or an audiotape or videotape recording made by the department of human services, a juvenile court officer, a peace officer or a hospital relating to a child in a proceeding under this division is admissible notwithstanding any objection to hearsay statements contained in it provided it is relevant and material and provided its probative value substantially outweighs the danger of unfair prejudice to the child's parent, guardian, or custodian. The circumstances of the making of the report, study, record or other writing or an audiotape or videotape recording, including the maker's lack of personal knowledge, may be proved to affect its weight.

Iowa Code § 232.96(6) (1995).

still find there was clear and convincing evidence to support the termination of the mother's parental rights. *See, e.g., In re Scarlett,* 231 N.W.2d 8, 10 (Iowa 1975) (supreme court disregarded improperly admitted hearsay evidence in appeal of termination action).

III. Testimony of State's Witness. In framing her third issue, Kim alleges the testimony of two of the State's witnesses, Jon Coon and Bill Ivey, went beyond the areas in which they were qualified to testify. However, her brief addresses only the testimony of Mr. Coon and does not specify what testimony given by Mr. Ivey is objectionable. A party is required to present to the appellate court the precise matter of which he or she complains. *See Cook v. State*, 431 N.W.2d 800, 804 (Iowa 1988). As a result of her failure to specifically designate what testimony of Mr. Ivey is objectionable, we address only her objection to the testimony of Mr. Coon.

Mr. Coon is a family center service worker who provided counseling to Kim's family. Kim claims Mr. Coon should not have been allowed to base any of his conclusions on Chad's play therapy or on information he obtained from the family's social worker. It is not clear that Kim adequately objected and preserved error on either of these concerns. However, even if she did, we find these arguments are without merit. Mr. Coon indicted he learned about the use of play therapy through in-service training at Young House Family Services. Any evidence about his lack of formal training and inability to screen out other factors affecting a child's play went

to the weight, not the admissibility, of the evidence. Likewise, Mr. Coon's reliance on information from the social worker in forming an opinion on the need for termination goes to the weight, not the admissibility, of his opinion.

IV. Section 232.116(3)(c). Kim argues the termination of her parental rights was not in the best interests of the children, and it was an abuse of discretion for the juvenile court to terminate her parental rights under section 232.116(3)(c). Section 232.116(3)(c) provides:

> The court need not terminate the relationship between the parent and child if the court finds any of the following: . . . .There is clear and convincing evidence that the termination would be detrimental to the child at the time due to the closeness of the parent-child relationship.

Kim argues she has a close bond with her children and they might not be adoptable if her parental rights are terminated. A finding a child is adoptable is not required before parental rights may be terminated. *See In re T.C.*, 522 N.W.2d 106, 109 (Iowa App. 1994). These children have been separated from their parents and in foster care since April 1993. With the exception of the termination hearing, Kim had no visits with them since April 1994.

Under section 232.116(3), the decision to not terminate parental rights where the grounds to do so are otherwise established is discretionary and not mandatory upon the juvenile court. *See In re C.L.H.*, 500 N.W.2d 449, 454 (Iowa App. 1993). We find there was not clear and convincing evidence the closeness of the parent-child relationship would make termination detrimental to the child.

AFFIRMED.

Streit, J., concurs; Sackett, C.J., specially concurs.

SACKETT, C.J. (concurring specially)

I concur specially without opinion.