IN THE COURT OF APPEALS OF IOWA

No. 1-242 / 91-44

FILED
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CLERK SUPREME COURT

IN THE INTEREST OF C.C. AND D.C., Minor Children,

T.C., Mother,

Appellant.

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Appeal from the Iowa District Court for Black Hawk County, Stephen C. Clarke, Juvenile Referee.

The mother of two children appeals a juvenile court order terminating her parental rights. **AFFIRMED.**

Kevin D. Engels, Cedar Falls, for appellant mother.

Bonnie J. Campbell, Attorney General, John M. Parmeter and Kathrine S. Miller-Todd, Assistant Attorneys General, for appellee State.

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

HAYDEN, P.J.

This case involves a boy born February 12, 1987, and a girl born February 25, 1988. Their parents' marriage was dissolved in October 1990. The marriage was volatile and marked by physical violence, frequent separations, and adulterous affairs by the father.

In November 1988 the mother took the daughter, then around eight months old, to a hospital emergency room. She had a severe skull fracture, a broken leg, and a broken wrist. The mother failed to give a satisfactory explanation for the injuries. Over succeeding months she gave several different and inconsistent explanations. Doctors have accepted none of her explanations. They believe the injuries resulted from physical abuse.

The daughter was placed in emergency foster care during November 1988. The son was placed in emergency foster care during December 1988. Both children have remained in foster care continuously since their emergency placements. In March 1989 both children were adjudicated to be children in need of assistance.

There was evidence the mother is unable to control her temper. She has engaged in rough physical discipline of her son even during supervised visitation. There is evidence she resents her daughter. A therapist testified, in spite of extensive counseling, the mother has made little progress with her problems and remains secretive and deceitful with the counselor.

During August 1990 the State filed a petition to terminate the parental rights of both parents to both children. After a hearing, the juvenile court terminated the parental rights of both parents.

The father consented to termination of his parental rights. He does not appeal.

With regard to the mother, the juvenile court relied on Iowa Code sections 232.116(1)(c) and (1)(g). Subsection (g) permits termination if a child cannot safely be returned to a parent's home following a CINA adjudication and extended foster care. Subsection (c) permits termination if a child has been physically or sexually abused and if services provided to the parents have failed to correct the circumstances which led to the abuse. The mother appeals. We affirm.

The mother claims the juvenile court erred in compelling disclosure of information of her counseling sessions with a psychologist she had privately retained. She also claims the juvenile court's decision was not supported by clear and convincing evidence. Finally, she claims the juvenile court failed to give due consideration to the closeness of the children with her as their mother.

Our scope of review is de novo. In re J.D.S., 436 N.W.2d 342, 343 (Iowa 1989). We give weight to the fact findings of the juvenile court, especially when considering the credibility of the witnesses, but are not bound by them. Id.; Iowa R. App. P. 14(f)(7). We review the facts and evidence presented to the juvenile court.

During the two years these children have been removed from their parents' custodies, the Department of Human Services (DHS) and other agencies have provided intensive case work services. DHS attempted to stabilize this family so the children could be returned to the custody of their parents. From time to time the parents showed progress in their relationship and in their ability to care for the children. After short periods of progress, however, the parents' relationship would deteriorate, and the children's needs would again take a back seat to the dysfunctional relationship between the mother and father.

The juvenile court gave great weight to the testimony of family therapist Mary E. Crawford. She had 104 sessions with these parents and their children. Notwithstanding these sessions and the additional services received by the mother from individual counseling, it is the professional opinion of the family therapist both children's safety would be at risk if left alone with the mother for lengthy periods of time. The mother is unable to control her anger level. Ms. Crawford has observed the mother roughly discipline D.C. during supervised visitation. As recently as September or October of 1990 she observed the mother to have bruised hands, and the mother told her she had got into a fight with another woman.

Mary Crawford also observed that over a lengthy period of her professional relationship with the mother she still considered her to be secretive and deceitful. Although the

mother has been able to gain some stability in the last few months, Ms. Crawford attributes that primarily to the intervention of her family and the fact she moved home with her parents. Ms. Crawford expressed the opinion as the mother has appeared to progress in the last few months, she had the opinion the mother was withholding more information from her than she had previously.

The record supports the opinion of the family therapist. Some of the witnesses called on behalf of the mother were uninformed as to the extent of the injuries to the daughter which originally brought this matter under the court's jurisdiction. The individual therapist whom the mother has sought out since her move to Fayette County, Iowa, testified to personal progress the mother made in stabilizing her living situation and maintaining a job. The mother did not inform her therapist of a physical confrontation with another woman in late September or early October, nor did she discuss with her individual therapist her off-again-on-again contacts with Jamie Hansen.

In her own testimony, the mother expressed only vague recollection of her fight with another woman and did not recall this resulted in bruises to her hands. The mother also denied having a "relationship" with Jamie Hansen. She admits as recently as December 10, 1990, she had a "date" with Jamie Hansen. On that night they had a disagreement, and she admitted Mr. Hansen choked her. Through other questioning she admitted Mr. Hansen is a married man with two children and is an admitted abuser of "crank."

The guardian ad litem had an active involvement in case planning with respect to these children. She has reviewed the attempts of DHS to reunite this family and strongly recommends the parent-child relationship be terminated.

I.

We first address the mother's contention the juvenile court erred in compelling disclosure of information regarding her counseling sessions with her privately retained psychologist/hypnotist. She argues this information was protected against disclosure by the privilege set out in Iowa Code section 622.10. We recite the pertinent portion of that statute.

> A practicing . . . mental health professional . . . who obtains information by reason of the person's employment . . . shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline.

The mother privately retained Dr. James Harding to determine whether the mother could supply more information about the injuries sustained by her daughter. Dr. Harding discovered inconsistencies in the accounts the mother had given for the injuries to her daughter. For example, her reason for revealing the fall from the porch changed, she did not mention a bath accident, and she did not mention injuring the infant's leg. The mother revealed a great deal about how she felt about the child at the time of the

injuries and how she responded to the child at the time of the injuries. The information of the psychologist also addressed the mother's ability to parent.

In the case of State ex rel. Leas in the Interest of O'Neal, 303 N.W.2d 414, 419 (Iowa 1981), our supreme court discussed the issue now before us. In deciding the applicability of the physician-patient privilege contained in section 622.10, the court held it was abrogated by Iowa Code section 232.96(5). Section 232.96(5) provides:

> Neither the privilege attaching to confidential communications between a health practitioner or mental health professional and patient nor the prohibition upon admissibility of communications between husband and wife shall be ground for excluding evidence at an adjudicatory hearing.

The physician-patient privilege is thus clearly abrogated with regard to termination proceedings commenced on or after July 1, 1979. Id.

Also Iowa Code section 232.74 was in effect at the time the termination hearing was held. That section reads as follows:

> **232.74 Evidence not privileged or excluded.**
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> Sections 622.9 and 622.10 and any other statute or rule of evidence which excludes or makes privileged the testimony of a husband or wife against the other or the testimony of a health practitioner or mental health professional as to confidential communications, do not apply to evidence regarding a child's injuries or the cause of the injuries in any judicial proceeding, civil or criminal, resulting from a report pursuant to this chapter or relating to the subject matter of such a report.

The mother argues O'Neal is distinguishable from the

instant case because the legislature meant for section 232.96(5) to be strictly construed. She asserts it was intended to apply only to those instances where court-appointed medical or mental health counseling is involved. We do not agree. The O'Neal court did not so limit or restrict its application. We observe sections 232.74 and 232.96(5) make it clear the legislature wanted mental health professionals and physicians to be able to testify about injuries to children, their causation and their parents' abilities to parent.

The mother also claims Dr. Harding's testimony was protected against disclosure by Iowa R. Civ. P. 125(b). That rule is as follows:

> b. Expert who is not expected to be called as a witness. The disclosure of the same information concerning an expert used for consultation and who is not expected to be called as a witness at trial is required if the expert's work product forms a basis, either in whole or in part, of the opinions of an expert who is expected to be called as a witness. Otherwise, a party may discover the identity of and facts known, or mental impressions and opinions held, by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in R.C.P. 133, or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Rule 1.3 of the Iowa R. Juv. P. states the rules of civil procedure, divisions V and VII, governing discovery, depositions, and perpetuation of testimony in civil proceedings shall apply to proceedings under Iowa Code

chapter 232, divisions III and IV, where not inconsistent with these rules or with statutes. In the case before us a conflict exists because Iowa Code section 234.96(5) applies to termination proceedings. We determine Iowa R. Civ. P. 125(b) cannot prevent disclosure of information allowed under Code section 232.96(5). Central to a determination regarding parental rights is the best interests of the child. In the Interest of Dameron, 306 N.W.2d 743, 745 (Iowa 1981). We affirm on this issue.

II.

We next address the mother's claim the juvenile court's decision was not supported by clear and convincing evidence. The grounds alleged here for termination of parental rights must by statute be proven by clear and convincing evidence. Iowa Code section 232.116(1)(e)(3).

The mother claims she has made improvements in her development. We note she has divorced her abusive husband, and this is an improvement. She has obtained employment. She has moved back with her parents in Oelwein, Iowa. However, she has taken up association with one Jamie Hansen, a married man with two children. He has physically abused her and is an admitted drug user. She has not been honest with Dr. Harding. She has withheld information and has not been honest with family therapist Mary Crawford and other counselors and persons who have offered to help her. We note Ms. Crawford had 104 sessions with the parents and

the children. These persons' opinions are the children would be at risk if left alone with the mother for long periods of time. At first she denied having a recent relationship with Jamie Hansen, but when confronted with the facts, she admitted to having a date with him recently.

The juvenile referee found, although the mother would like the court to believe she has made a significant change since her move to Oelwein in August 1990, her own admissions support a finding she is not to be believed. It is clearly shown she has not been honest with the juvenile court during the hearing on this matter.

The mother's assertion she has made significant improvement is contrary to the testimony of her psychologist:

> [T.C.] has a problem with significant lack of awareness or naivete, of her impact on her children and the needs of her children. She does not show an appreciation of children's needs and their developmental levels. With this lack of information and feedback, she would have great difficulty with new learning and responding to their needs in a more appropriate manner. Because of the extensiveness of her active neglect and rejection of [C.C.], this would place not only this child but other children as well at risk.

He also stated the mother had participated in services for a long time. She still had much to learn, and he doubted she could ever grow enough to appropriately and safely care for her children.

In making our decision in this case we again look to In re Dameron for guidance.

> Central to a determination of this nature are the best interests of the child. In this

> connection, we look to the child's long-range as well as immediate interests. Hence, we necessarily consider what the future likely 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 that parent is capable of providing. This court has often recognized that there exists a parental interest in the integrity of the family unit; nonetheless we also are cognizant that this interest is not absolute, but rather may be forfeited by certain parental conduct. Because the State, as parens patriae, has the duty to assure that every child within its borders receives proper care and treatment, it must intercede when parents abdicate that responsibility. It is our view that the current statutory termination provisions applicable here, like those they replaced, are preventative as well as remedial. The provisions therefore mandate action to prevent probable harm to a child and do not require delay until after harm has occurred. (citations omitted.)

Id. at 745. Also, we adhere to the following established principles. Termination may occur under the statute where there is clear and convincing evidence that the child has been in foster care for twelve months and would probably suffer harm if returned home. Iowa Code section 232.116(1)(e) (1991); In the Interest of Chad, 318 N.W.2d 213 (Iowa 1982). The child should not be forced to endlessly suffer the parentless limbo of foster care. Long v. Long, 255 N.W.2d 140, 146 (Iowa 1977). He or she need not endlessly await the maturity of his or her natural parent. In the Interest of T.D.C., 336 N.W.2d 738, 744 (Iowa 1983). Termination must occur if enough time (twelve to eighteen months) has passed and the parent still cannot take care of the child. Id. After twelve months, the case

must be viewed with a sense of urgency. In the Interest of A.C., 415 N.W.2d 609, 614 (Iowa 1987).

We hold the juvenile court's decision to terminate the mother's parental rights to these two children is supported by clear and convincing evidence. We affirm on this issue.

III.

Lastly, we address the mother's contention the juvenile court failed to give due consideration to the closeness of her relationship with the children. According to Iowa Code section 232.116(3)(c) (1989):

> The court need not terminate the relationship between the parent and child if the court finds any of the following:
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> * * *
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> c. 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.

This statutory exception requires proof by clear and convincing evidence to justify its application. In Interest of K.F., 437 N.W.2d 559, 564 (Iowa 1989). Under this record, that standard cannot be met.

The mother's track record is not good. There were severe injuries inflicted upon C.C. when she was less than two years old. The mother has not been honest in her account of these injuries. The mother's new therapist and her psychologist testified about her ambivalent relationships and deep resentment of the daughter C.C. She preferred to give her son all of her attention. The

psychologist testified any child would be at risk in the mother's care. Although the bonding between mother and son was stronger, D.C. commenced to show problems in their relationship in the summer of 1990. The boy stated at times he hated his mother and banged his head on the floor. His negative behavior increased to the extent visitation was required to be decreased in the fall of 1990.

Even though the mother has divorced her abusive husband, has moved back in with her parents, has obtained employment and has shown some personal progress, she has a long way to go. The evidence also indicates the mother's relationship with these children is marked by as much ambivalence as affection. She has a propensity to maintain an association with violent and abusive men. She has not been truthful with those who have attempted to help her or with the juvenile court during these proceedings.

We hold it is within the sound discretion of the juvenile court, based upon the unique circumstances before it and the best interest of the child or children, whether to apply section 232.116(3)(c) to save the parent-child relationship. See In the Interest of J.V., 464 N.W.2d 887, 890 (Iowa App. 1990). In view of the nature of the relationship and the strength of the evidence otherwise supporting termination, we find no basis to set aside the juvenile court's judgment on this ground.

AFFIRMED.

Habhab, J., concurs; Sackett, J., specially concurs.

SACKETT, J. (specially concurring)

I concur with the majority's decision to affirm the trial court order terminating parental rights. In making this determination, I have excluded from my consideration the information the trial judge ordered the natural mother to disclose relative to her sessions with a privately retained psychologist she consulted in an attempt to help her explain her daughter's injuries. The psychologist was retained after the injuries, and after the child was removed from the mother's home.

The majority has determined under Iowa Code section 232.74 the evidence was not privileged. While the majority may be correct, I have concern this decision may discourage parents whose children are the subject of child in need of assistance proceedings from seeking counseling with a psychologist or other mental health professional for fear statements made to the professional may be used against them in further proceedings.