FILED
MAY 31 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN THE INTERESTS OF: A.M., JR., J.M., A.M., M.M., M.M., M.M., D.M.,	)	
Children.	)	Filed May 31, 1983
A.M. & M.M., Parents,	)	3-55 3-68888
Appellants.	)	

Appeal from Shelby District Court - Dan R. McTaggart, District Associate Judge.

The natural parents appeal from the juvenile court's ruling terminating their parental rights to each of their seven children. AFFIRMED.

Ken Sojka of Buckley & Sojka, Harlan, for the parents.

Marilyn Lantz of the Youth Law Center, guardian ad litem.

Thomas J. Miller, Attorney General, and Brent Hege, Assistant Attorney General, for appellee State.

Heard by Oxberger, C.J., and Donielson, Snell, and Schlegel, JJ. Hayden, J. takes no part.

DONIELSON, J.

The natural parents appeal from the juvenile court's ruling terminating their parental rights to each of their seven children. On appeal they contend that the court erred (1) by finding the evidence sufficient to prove that the children could not be returned to their parents' custody; (2) by refusing to appoint separate counsel for each parent; and (3) by taking judicial notice of several documents which had been introduced as exhibits in an earlier CHINA proceeding. We affirm.

Appellate review of proceedings to terminate a parent-child relationship is de novo and, while we accord weight to the findings of the trial court, we are not bound by those findings. In Interest of Dameron, 306 N.W.2d 743, 745 (Iowa 1981).

I.

The seven children of Mr. M and Mrs. M were found to be children in need of assistance in November, 1980. At that time the children's ages ranged from two months to seven years. This matter came to the attention of the authorities when Mrs. M. went to the courthouse with the children after she had been beaten by her husband. The family had been living in the basement of a home owned by the brother of Mr. M. The one-room basement was twenty (20) feet by twenty-two (22) feet in size, was cold, and had only a slow-cook pot and a hot plate for cooking facilities. In December, 1980, the court entered a dispositional order continuing the children's foster care. When the parents did not appear at the July 8, 1981, CHINA dispositional review hearing, the foster care was again continued. On August 4, 1981, a petition seeking termination of parental rights was filed pursuant to Iowa Code § 232.116(4) (1981). The whereabouts of the parents was unknown. Eventually the parents contacted the department of social services and indicated that they wished to regain custody of their children.

The parties entered into a stipulation under which the petition was to be amended to include section 232.116(5) as grounds for termination and the

termination hearing was to be continued until May, 1982. Certain terms and conditions were to be met, including that the children and the parents were to receive psychiatric evaluation and treatment; the parents were to complete parenting skills training class, obtain suitable housing, maintain employment, and keep the department of social services advised of any changes in their address. These terms and conditions were incorporated into the court's October 5, 1981, order. The parents subsequently moved back into the home of Mr. M.'s brother, which had been somewhat remodeled. Mrs. M. became pregnant with the couple's eighth child. The hearing was held May 19, 1982. The court noted that the couple had failed to comply with any of the terms and conditions of the October 5, 1981, order and that the children could not be returned to the parents' custody. The court thus ordered the parental rights to all seven children be terminated. This appeal followed.

II.

Initially, the parties contend that there was not clear and convincing evidence that the children could not be returned to the custody of the natural parents. In examining the record before us, we are guided by well-established principles which were stated by the court in the Dameron case.

> Central to a determination of this nature are the best interests of the child. [citation] In this connection, we look to the child's long range as well as immediate interest. Hence, we necessarily consider what the future likely holds for the child if returned to his or her parents. Insights for those determinations can be gained from evidence of the parents' past performance, for that performance may be indicative of the quality of the future care that parent is capable of providing. [citations]
>
> 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 that it may be forfeited by certain parental conduct. [citations] 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. [citations]

> Furthermore, it is our view that the current statutory termination provisions applicable here, like those they replace, are preventive as well as remedial. The provisions therefore mandate action to prevent probable harm to a child and do not require delay until harm has occurred. [citations]
>
> Finally, as previously noted, the grounds alleged here for the termination of parental rights must by statute be proven by clear and convincing evidence. [citation]

306 N.W.2d at 745. Of particular importance to the resolution of this controversy is the court's determination of the standard of the parties' burden of proof under Iowa Code § 232,116(5)(c).

> The reference to section 232.102 creates a burden of proof problem that we have recognized, but not previously resolved. See In re Dameron, 306 N.W.2d 743, 744, 747 n.4 (Iowa 1981); In re Adkins, 298 N.W.2d 273, 278 (Iowa 1980). The problem is that section 232.114(5)(c) requires clear and convincing proof that the child cannot be returned to the custody of the parents, whereas section 232.102(6) requires temporary placement be terminated and the child returned to his home if the court finds, by a preponderance of the evidence, that the child will not suffer harm in the manner specified in section 232.2(5). See In re Blackledge, 304 N.W.2d 209, 214-15 (Iowa 1981). We resolve this conflicting standard of proof problem by holding that in the termination of parental rights context, the clear and convincing standard of section 232.114(5) prevails and applies to the showing of harm required pursuant to section 232.2(5). In other words, before a termination of parental rights can occur under section 232.114(5), there must be clear and convincing proof that the child will suffer harm in the manner specified in section 232.2(5). This is the minimal burden of proof now required in this type of case by the due process clause of U.S. Const. amend. XIV. Santosky v. Kramer, ____ U.S. ____, ____, 102 S. Ct. 1388, ____, 71 L. Ed. 2d 599, 603 (1982).

In Interest of Chad, 318 N.W.2d 213, 219 (Iowa 1982).[1] With these principles in mind, we examine the merits of this controversy.

It is clear from the record that the conditions existing at the time of the CHINA proceedings were inadequate for this family. The basement living area was extremely small, there were inadequate cooking facilities, the children were

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1 Section 232.114 was renumbered section 232.116 in the 1981 Code.

dirty and ill-clothed. There had also been violence in the home; the mother had been beaten by the father and the children were scared of him. After the children were removed from the home, it became clear that they lacked many basic skills such as how to use silverware, how to use soap to keep themselves clean, or how to use toilet facilities. Once in foster care, remedial work with the children was begun in the areas of speech, socialization and education. Since they were removed from the home the children have improved in these areas.

The parents, however, failed to use this time to improve their own living conditions. They made little, if any, attempt to accomplish the court ordered requirements to get the children back. They were ordered to acquire adequate housing, receive parenting skills training, arrange for visitation rights, and, additionally, the father was ordered to obtain a psychiatric evaluation and attend an alcoholic treatment center. After six months the parents had not complied with these orders and had left the state without notifying the court. They were not present at the review hearing and foster care was continued.

When termination was sought, the parents stipulated that they would establish a regular visitation schedule, that they would attend an education course in parenting, that they would establish permanent housing suitable for their seven children, that at least one parent would maintain consistent employment, and that they would have a psychiatric evaluation and complete any recommended treatment. At the time of the termination hearing, however, the parents had still taken little, if any, action on these matters. Their visitation record was extremely poor, though the social worker had encouraged the parents to visit the children and attempted to help them do so. It appears that after the parents did visit the children, the children exhibited adverse effects such as bedwettings, nightmares, and nausea. Because of this, the parents were to work with the child psychiatrist to establish appropriate circumstances and conditions for further

visitation. Yet, despite numerous attempts by the social worker to make time and transportation arrangements for the parents to meet with the child psychologist, the parents did not meet with the doctor and did not visit the children. The parents also failed to obtain psychiatric examinations for themselves, or to attend a class on parenting, to establish a permanent residence which would be appropriate for the entire family, or to obtain steady employment. It appears to us that the parents did not even put forth a diligent effort to accomplish these requirements, even though they knew that their children would not be returned to them unless and until they had done so. Both the parents and the father's brother-in-law admit that there is not enough room for the seven children in the basement of the residence where they now live. Moreover, the father's brother-in-law testified that he would not be able to assume the support of seven additional children.

The trial court found, and we agree, that this situation has continued for far too long and that the best interests of these children require that they be available for adoption in a safe and suitable home. While they have been given many chances to prove otherwise, the parents have demonstrated that they are unable to provide such a home for their children. As has been noted repeatedly, "[o]ur termination statute is preventative as well as remedial and does not require delay until after harm has been done." O'Neal, 303 N.W.2d at 423. We thus agree with the trial court that "it would be in the best interests of these children if the parent-child relationship between them and their parents were terminated."

III.

Appellants also contend that the juvenile court erred by taking judicial notice of several documents which had been introduced as exhibits at the earlier CHINA hearing. They assert that the exhibits were relevant only to the limited inquiries of a CHINA hearing, not to the much broader issues of a termination

hearing. They also assert that they were denied any opportunity to cross-examine the authors of the documents. In this connection they argue that they should not be penalized in the current termination proceeding for their failure to cross-examine the authors of the documents during the earlier CHINA proceeding.

We find the parents' arguments to be without merit. In In re Interest of Adkins, 298 N.W.2d 273, 277 (Iowa 1980), the court held that the prior CHINA case and all evidence therein could be judicially noticed in a termination of parental rights proceeding so long as the following safeguards have been met:

> Papers requested to be noticed must be marked, identified, and made a part of the record. Testimony must be transcribed, properly certified, marked and made a part of the record. Trial court's ruling in the termination proceeding should state and describe what it is the court is judicially noticing.

Id. Moreover, even if the procedural safeguards are not followed, there will be no reversible error if the court on appeal would reach the same conclusion "without resort to the CHINA proceedings other than the orders offered into evidence . . . ." Id. While we might reach the same conclusion without resort to the CHINA proceedings, we note that the procedural safeguards were followed in the instant case. Furthermore, appellants cannot now complain that they did not have an opportunity to cross-examine evidentiary matters of the CHINA proceeding. The parents voluntarily left the state without notifying the department of social services or the court. They were fully appraised of the nature and scheduling of the review hearing. They cannot now be heard to complain that they were denied an opportunity to challenge the evidence. See State v. Hendren, 311 N.W.2d 61, 62 (Iowa 1981) (criminal defendant who voluntarily absents himself from trial cannot claim that he was denied an opportunity to be heard).

The fact that the parents' present counsel was not retained until after the CHINA proceedings were completed is of no consequence; the right to cross-examine evidence in the CHINA proceeding belongs to the parents themselves, not

their counsel. We believe that by failing to attend the scheduled proceedings, the parents have waived that right.

IV.

Finally, counsel contends that the court erred in failing to appoint separate counsel for each of the parents in the termination proceeding. The parents' present counsel filed the motion to withdraw as counsel for one parent, the father, and to have separate counsel appointed for him. As grounds for his motion the attorney argued that, since the court could terminate the rights of one parent and not the other, there could be a point in the proceedings where one parent may be forced to choose between his or her spouse and the children. Specifically, counsel argued that the reports and evidence introduced at the CHINA hearing "seemed to be more adverse to the father." He thus argued that he would be in a potential conflict position in representing both parents since he might have to raise a defense for one parent which would be harmful to the other. Counsel relies on canons and ethical considerations from the Code of Professional Responsibility in urging this court to find that representation by an attorney of both parents in a termination proceeding analogous to an attorney representing co-defendants in a criminal law context where their personal liberties are at stake. We do not believe the two cases are analogous and refuse to create a per se rule requiring the natural parents in a termination proceeding to secure independent counsel.

The canons and ethical considerations of the Code of Professional Responsibility require an attorney to make full disclosure to the clients who have potentially differing interests. Ethical consideration 5-16 provides, in part, that

> [i] n those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus before a lawyer may represent multiple clients, he should explain fully to each client the implica-

tion of the common representation and should accept or continue employment only if the clients consent. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, he should also advise all of the clients of those circumstances.

In this case counsel explained the potential conflict in detail. The testimony of each parent, when questioned by counsel and by the court, indicated that both wished Mr. Sojka to continue to represent them:

> Q. As your attorney, Marla, have I consulted with you concerning a potential conflict between your marriage relationship and getting your children back? A. I don't think I understand that.
>
> Q. Have I talked to you about the possibility that in this proceeding there may be a choice that you would have to make between your husband and your children? A. Yes, you did that.
>
> Q. And did you understand that? A. Yes.
>
> Q. And did I in fact ask you — A. Yes.
>
> Q. —what that choice — what your choice would be if that question were asked to you? A. Yes, you did ask me.
>
> Q. And you were then agreeable to the Motion that I filed asking for a separate attorney to be appointed for your husband? A. At that time, yes.
>
> * * *
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> Q. What is your position today? Would you still like to have a separate attorney appointed for your husband? A. No, we would not. We'd like to stay together and work it out together.
>
> Q. All right.
>
> THE COURT: You're satisfied with the representation that Mr. Sojka has been giving you and your husband? THE WITNESS: Yes, we are.
>
> THE COURT: At the present time, and it is your desire that — THE WITNESS: We want to stay together.
>
> THE COURT: You want to stay with Mr. Sojka?

You don't want another attorney? THE WITNESS: No.

> THE COURT: You do not wish to have a separate attorney represent you? THE WITNESS: No, we do not.

Q. You understand, then, Marla, that by having me there may come a point where I will not be able to raise the issue about having the children returned to you alone if your husband is the problem? A. Yes, I understand that.

Q. All right. Or returned to your husband alone if you are determined to be a problem? A. Yes.

* * *

> THE COURT: You are satisfied with services rendered so far by Mr. Sojka? THE WITNESS: Yes, Your Honor.
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> THE COURT: And even though Mr. Sojka may indicate that there may be a conflict between you and your wife, is it still your desire to have Mr. Sojka represent you? THE WITNESS: Yes, sir.
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> THE COURT: You understand the nature of these proceedings? THE WITNESS: Yes, petition for termination of parental rights, Your Honor.
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> THE COURT: You realize that if they are terminated, why, that's final? THE WITNESS: Yes, Your Honor.
>
> THE COURT: Subject, however, to appeal. Other than that it would be final, you understand that? THE WITNESS: Yes, Your Honor.

Based on this testimony, the court denied counsel's motion. The parents consented to their representation with full knowledge of all potential conflicts and circumstances. They cannot now be heard to complain that a conflict existed and that they were denied effective representation as a result. See U.S. v. Martorano, 610 F.2d 36, 39 (1st Cir. 1979) (defendant can waive right of separate counsel if fully appraised of the risks of joint representation and of the opportunity for separate counsel). The parents' wish not to have separate counsel was honored in the instant case. We believe their statutory right to be represented by counsel was not violated. See Iowa Code § 232.113 (1981).

Having considered all of appellants' contentions and having found them to be without merit, we affirm the termination of their parental rights to all seven children named in the proceeding.

AFFIRMED.