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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN THE INTEREST OF K.L.B., A Child;	)	Filed January 29, 1986
	)	29
D.B., Natural Mother, and **J.B.,** Natural Father,	)	5-587 / 85-136
Appellants.	)	

Appeal from the Iowa District Court for Pottawattamie County - G. T. Reilly, Judge.

The natural parents of a four-year-old girl appeal from the juvenile court order terminating their parental rights pursuant to Iowa Code section 232.116(5). **AFFIRMED.**

Timothy O'Grady of Over, Over & Over, Council Bluffs, for appellant D.B.

Stephen L. Rosman of Finerty & Rosman, Council Bluffs, for appellant J.B.

Thomas J. Miller, Attorney General; Gordon E. Allen, Special Assistant Attorney General; and E. A. Westfall, Assistant County Attorney, for appellee State.

Jack Ruesch of Telpner, Smith & Sawatzke, Council Bluffs, for the child.

Heard by Oxberger, C.J., and Snell and Hayden, JJ.

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D.B. and J.B. are the natural parents of K.L.B., born prematurely in August of 1981. During K.L.B.'s extended hospital stay after her birth, staff members became concerned about D.B.'s ability to properly care for her upon release. D.B. is mentally retarded with an I.Q. of 69 and was unable to feed and change K.L.B. In November of 1981, K.L.B. was adjudicated a child in need of assistance. K.L.B. has never been placed in her parents' care without continuous supervision. She has been in foster care since her discharge from the hospital after birth. In January of 1983, a petition was filed to terminate D.B. and J.B.'s parental rights pursuant to Iowa Code section 232.116(5) (1983).

In December of 1981, a case plan was developed by the Department of Human Services for D.B. and J.B. These parents complied with the plan in its entirety--they received psychological and psychiatric evaluations, they attended parenting classes sponsored by the Red Cross, they attended parenting classes sponsored by the Visiting Nurses Association, they were allowed supervised in-home visitation with K.L.B., they demonstrated love for K.L.B., and at all times cooperated with the agencies attempting to teach them parenting skills. However, the professionals involved concluded that D.B. and J.B. failed to demonstrate sufficient improvement in their parenting skills to warrant K.L.B.'s return to their custody.

In September of 1983, the juvenile court found that although there was sufficient evidence that K.L.B. still remained a child in need of assistance, it would give them "the benefit of the doubt" and exercise its discretion not to terminate their parental rights, because they had cooperated to the best of their ability with the Human Services Department programs to improve their parenting skills. The juvenile court therefore dismissed the termination petition at that time.

In May of 1984, another termination petition was filed pursuant to Iowa Code section 232.116(5) (1983). D.B. and J.B. moved to dismiss the petition as insufficient. They asserted that the dismissal of the earlier petition precluded relitigation of the termination issues and also that the new petition conceded that J.B. was in fact able to adequately care for K.L.B. The juvenile court denied the motion to dismiss, stating that in ruling on the present petition, it would consider whether circumstances had changed since the previous petition was dismissed. After trial, the juvenile court found that there had been no improvement in D.B. and J.B.'s parenting skills and that J.B.'s children from an earlier marriage had moved in with them, causing some difficulty. The juvenile court noted that K.L.B.'s best interests required that she be afforded permanency. The juvenile court therefore granted the petition and terminated D.B. and J.B.'s parental rights with respect to K.L.B.

On appeal, D.B. and J.B. assert that (1) there was not sufficient evidence that K.L.B. could not safely be returned to their custody, and (2) the dismissal of an earlier petition to terminate their parental rights precludes relitigation of termination issues.

Our review of proceedings to terminate a parent-child relationship is de novo. In Interest of C.W., 342 N.W.2d 885, 886 (Iowa Ct. App. 1983). We give weight to the fact findings of the juvenile court, especially when considering the credibility of witnesses, but we are not bound by them. In Interest of W.G., 349 N.W.2d 487, 491-92 (Iowa 1984); Iowa R. App. P. 14(f)(7). "[T]here exists a parental right to integrity of the familial relationship, unless by conduct it be forfeited." In Interest of Lewis, 257 N.W.2d 505, 510 (Iowa 1977). The best interests of the child are central to our determination. In Interest of Chad, 318 N.W.2d 213, 216 (Iowa 1982). "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. [Authorities]." In Interest of Dameron, 306 N.W.2d 743, 745 (Iowa 1981). Children must not be made to await their parent's maturity. In Interest of Kester, 228 N.W.2d 107, 110-11 (Iowa 1975). Children should not be made to suffer indefinitely in a parentless limbo. In re Interest of Griffin, 210 N.W.2d 665, 667 (Iowa 1973).

Sufficiency of Evidence. D.B. and J.B. contend that the State's action to terminate their parental rights is predicated solely on their low intellectual functioning. The parents argue that because the State concedes that J.B. is a competent caretaker, there is no evidence which supports termination. Iowa Code section 232.116(5) (1983) provides that the court may order the termination of parental rights if it finds that:

> a. The child has been adjudicated a child in need of assistance pursuant to section 232.96; and
>
> b. The custody of the child has been transferred from the child's parents for placement pursuant to section 232.102 for at least twelve of the last eighteen months; and
>
> c. 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.

It is conceded that K.L.B. was adjudicated a child in need of assistance. It is also conceded that her custody has been transferred from her parents "for placement pursuant to section 232.102 for at least twelve of the last eighteen months." Therefore, the sole remaining issue for our determination is whether the evidence sufficiently proved that K.L.B. cannot be returned to her parents' custody.

Iowa Code section 232.102 (1983) provides that a child should not be returned "where the child cannot be protected from some harm which would justify the adjudication of the child as a child in need of assistance . . . ." The types of harm which would justify such an adjudication are set forth in Iowa Code § 232.2(5) (1983). Subsection (b) thereof states that a child is a child in need of assistance if he or she would be imminently likely to be abused or neglected by the parent. "Abuse or neglect" is defined to be "any nonaccidental physical injuries suffered by a child as a result of the acts or omissions of the child's parent . . . ." Iowa Code § 232.2(37) (1983). Subsection (c) states that a child is in need of assistance if he or she is imminently likely to suffer harmful effects as a result of the failure of the child's parent "to exercise a reasonable degree of care in supervising the child."

The two in-home homemakers and the Human Services staff involved with this case testified that K.L.B. could not safely be returned to her parents because no progress in their development of parenting skills had occurred. Even J.B. himself stated that D.B. would never be capable of caring for K.L.B. by herself. J.B.'s alleged parenting capabilities also cannot be viewed in a vacuum. The environment in which he would raise K.L.B. intimately involves D.B. Both parents have contributed to an environment where proper domestic and child care is lacking.

While J.B. made promises which played an influential role in the first juvenile court decision to dismiss the termination petition, these promises were not carried out. J.B. has not made arrangements for suitable and affordable alternative care while he was at work. While J.B. has appeared to everyone to be a minimally capable parent, he is unable to perform that role twenty-four hours a day because of his employment. J.B. does not demonstrate the motivation to take over active parenting of K.L.B. Furthermore, not only has D.B. failed

to improve her parenting skills, she has in fact regressed somewhat. The in-home supervisors testified that D.B. is exhibiting more strange behavior, ignores instructions, and verbally threatens the supervisors and others. Moreover, K.L.B. is becoming disturbed by D.B.'s overwhelming affection during visitation, and evidences self-destructive behaviors such as pulling her hair, biting her hand, and banging her head when she returns to her foster parents. These are behaviors which D.B. typically displays.

Additionally, the stability of the B.'s home situation is questionable. J.B. and D.B. both testified that if K.L.B. is not returned to them, they will separate. J.B. also recently brought his children from a prior marriage into the home. Physical altercations have ensued between these children and D.B., and J.B. does not intervene to protect D.B.

We find that there is clear and convincing evidence that the conditions leading to the court's placement of K.L.B. in a foster home and its subsequent adjudication of her as a child in need of assistance have not been corrected despite cooperative efforts by D.B. and J.B. We conclude that there is no reasonable probability that these conditions will be corrected in the future in view of D.B. and J.B.'s inability to meet the needs of K.L.B. without continuous supervision. While mental disability such as appears in this case is not alone a sufficient reason to terminate parental rights, it "is usually a contributing factor in a person's inability to perform the duties of parenthood according to the needs of [the] child." In Interest of Wardle, 207 N.W.2d 554, 563 (Iowa 1973). It is not the low-level intellectual functioning of these parents alone which mandates our determination. Rather, it is their lack of parenting skills and their lack of capacity to learn and improve these skills.

We are told that K.L.B. could possibly receive the nourishment and care she needs if returned to her parents if indefinite foster care was provided to

cover the periods when J.B. worked, or continuous in-home homemaker service was furnished. The purpose for providing in-home supervision for this family was to train the parents to take over responsibility for their child. These homemaking and nutrition services are not intended to be indefinitely provided in lieu of parenting by the parents.

We do not doubt that D.B. and J.B. sincerely love K.L.B. and wish to be united as a family. However, the best interests of K.L.B. mandate a severance of D.B. and J.B.'s parental rights.

Issue Preclusion. D.B. and J.B. contend that because the original petition for termination of parental rights was dismissed, all relitigation of termination issues is now barred.

On September 26, 1983, the juvenile court found that clear and convincing evidence existed to sustain all three prongs of section 232.116(5) to justify termination of parental rights. Iowa Code section 117(3) (1983) provides that "If the court concludes that facts sufficient to sustain the petition have been established by clear and convincing evidence, the court may order parental rights terminated." (emphasis added). The juvenile court judge exercised the discretion afforded to him by the statute and decided not to terminate D.B. and J.B.'s parental rights at that time. Instead he ordered that K.L.B. was still a child in need of assistance and left custody with D.B. and J.B. under the supervision of Human Services. The court stated its reasoning for its decision as follows:

> That many and sundry services have been presented to and accepted by the parents of the minor child, [K.L.B.], and that the parents have to the best of their ability cooperated with the Department of Human Services in the past to alter, change, and improve their parenting skills regarding the minor child and have continuously cooperated in an effort to establish bonding between themselves and the minor child and have consistently demonstrated to the Court that the parents wish to cooperate in whatever manner necessary in order to have the

> minor child, [K.L.B.], returned to their care, custody, and control.

There is no provision in chapter 232 which limits the number of times that a child can be found to be in need of assistance or the number of termination proceedings that can be filed on that basis. In November of 1981, K.L.B. was initially adjudicated a child in need of assistance. In September of 1983, K.L.B. was again so adjudged. More than twelve months have passed since the original finding and, specifically, in the nine months following the dismissal of the first termination petition, no change in the parents' skills or life-style occurred.

The doctrines of res judicata or issue preclusion have no application under these circumstances.

AFFIRMED.