

IN THE COURT OF APPEALS OF IOWA

No. 0-358 / 90-279

FILED

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CLERK SUPREME COURT

IN THE INTEREST OF D.L., A Minor Child,
M.B., Mother,
Appellant.

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Appeal from the Iowa District Court for Mahaska County,
Gene Glenn, Juvenile Referee.

Appellant appeals from juvenile court order terminating
her parental rights. **AFFIRMED.**

David D. Dixon of Heslinga, Heslinga, Dixon &
Grotewold, Oskaloosa, for appellant mother.

Thomas J. Miller, Attorney General; Gordon E. Allen,
Deputy Attorney General; Judy Sheirbon, Assistant Attorney
General, for appellee State.

Considered by Oxberger, C.J., and Hayden and Habhab,
JJ.

HABHAB, J.

Appellant, M.B., appeals from juvenile court order terminating her parental rights.¹ We affirm.

The child in question, D.L., is a boy born on January 23, 1985. On July 12, 1985², when he was about six months of age, he was taken to the hospital by his parents. He had a black eye, several dime-sized bruises, and a lump on the side of his head. A CAT scan revealed bleeding inside his head caused by two skull fractures and a possible third. X-rays were taken which revealed nine posterior rib fractures caused by at least two separate incidents. Thereafter, the State instituted child-in-need-of-assistance (CINA) proceedings. Neither parent could furnish a plausible explanation for D.L.'s injuries. Physical abuse was suspected, and both parents were considered as possible perpetrators of the abuse.

D.L. was adjudicated CINA on December 6, 1985, and the Mahaska County Department of Human Services was granted his legal custody for the purpose of continued foster care placement. The parents appealed and we affirmed both the adjudication and disposition orders. See In re D.L., 401 N.W.2d 201, 205 (Iowa App. 1986).

1. The father, T.L., has not appealed the termination of his parental rights.

2. The child became fussy during the afternoon of the 12th. Small marks were noticeable on his head. The child went stiff and then became limp, and there was swelling on the right side of his head above the ear.

Subsequently, periodic review hearings were held. One such review hearing was held on August 7, 1987. T.L. testified at this hearing of two separate occasions when he purportedly physically abused D.L. by shaking, slapping, and squeezing him. M.B. continued to deny having any knowledge of the abuse.

The juvenile court continued the terms of its prior orders regarding D.L. In doing so, the court found T.L.'s statements lacked credibility because they were at odds with the medical evidence presented at the hearing. The Iowa Supreme Court affirmed M.B.'s appeal of this order. See In re D.L., No. 87-1166, slip op. at 3 (Iowa Feb. 1, 1988).

On December 21, 1988, another review hearing was held. The court again found D.L. to be a child in need of assistance and continued the terms of its prior orders. The court also directed the department to institute termination proceedings. On May 3, 1989, the State filed a petition to terminate M.B.'s parental rights. On May 15, 1989, M.B. filed a motion for recusal in which she sought the recusal of Juvenile Referee Glenn from presiding over the termination proceeding.

Referee Glenn denied the motion for recusal on May 17, 1989. He heard evidence on the termination petition for three days. On August 28, 1989, the referee, in reliance on the suggestions in the unpublished opinion of this court, In re J.M., No. 89-531 (Iowa App. Aug. 23, 1989),

reversed his May 17th ruling and recused himself. Thereafter, the Iowa Supreme Court, on further review, rejected the suggested recusal language of this court in In re J.M. and held there is no automatic recusal requirement of a judge merely because he directs the filing of a termination petition. In re J.M., No. 89-531 (Iowa Nov. 3, 1989) (order granting further review). Following the supreme court's decision, Referee Glenn withdrew his prior recusal order and reinstated himself on the case. After hearing additional evidence on the termination petition, the court entered its order terminating M.B.'s parental rights.

Appellate review of termination proceedings is de novo. In re W.G., 349 N.W.2d 487, 491 (Iowa 1984), cert. denied, 469 U.S. 1222, 105 S. Ct. 1212, 84 L. Ed. 2d 353 (1985). We give weight to the findings of fact of the juvenile court, especially when considering the credibility of witnesses, but we are not bound by those determinations. Id. at 491-92.

I.

M.B. argues that the juvenile court erred in not granting her initial motion for recusal and also in reinstating itself after its prior recusal. The burden of proof is upon the party seeking recusal to establish a basis for it. See Forsmark v. State, 349 N.W.2d 763, 767 (Iowa 1984). Only when the court has abused its discretion will we interfere with its determination on the issue.

Id. We can discern no abuse of discretion by the juvenile court in either initially refusing to recuse itself from the termination proceeding or in reinstating itself after the Iowa Supreme Court's decision in In re J.M. The mere fact that Referee Glenn had presided over prior CINA hearings in this case does not necessitate his recusal from the termination proceeding absent bias or prejudice on his part. In re A.B., 445 N.W.2d 783, 784 (Iowa 1989).

II.

M.B. also asserts the State failed to prove by clear and convincing evidence that termination of her parental rights pursuant to Iowa Code section 232.116(1)(e) (Supp. 1989) was appropriate. The State has the burden to prove by clear and convincing evidence the allegations found in the termination petition. See In re C.M.T., 433 N.W.2d 55, 56 (Iowa App. 1988). Iowa Code section 232.116(1)(e) permits the termination of the parent-child relationship if the child has been adjudicated in need of assistance, has been placed out of the parent's custody for more than twelve of the last eighteen months, and there is clear and convincing evidence that the child will suffer a harm specified in Iowa Code section 232.2(6) if returned to the parent. See In re K.L.C., 372 N.W.2d 223, 227 (Iowa 1985).

M.B. concedes that the first two requirements of Iowa Code section 232.116(1)(e) have been satisfied. Therefore, the only question remaining concerns whether there is clear and convincing evidence that D.L. cannot be returned to

M.B.'s custody, as provided in section 232.102. The third requirement found in section 232.116(1)(e) is satisfied when the child cannot be returned to the parental home because of the existence of facts which would satisfy any definition of a child in need of assistance pursuant to Iowa Code section 232.2(6). See In re A.M.S., 419 N.W.2d 723, 725 (Iowa 1988).

The evidence overwhelmingly demonstrates that D.L. was physically abused on more than one occasion. Further, it is clear that one or both of D.L.'s parents bears the responsibility for these assaults. D.L.'s injuries in July of 1985 were of a life-threatening nature and should have been readily apparent to the child's caregivers. At the adjudicatory hearing, Dr. Kent testified the infliction of D.L.'s head injuries would have caused unconsciousness or prolonged screaming. He also testified the posterior rib fractures would have been very painful and noticeable by a caretaker. The doctor further stated such injuries occurred as a result of at least two episodes of child abuse and as many as nine.

Nonetheless, M.B. has continually denied committing the abusive conduct or having knowledge of it. Additionally, M.B. has continued her sporadic relationship with T.L. We conclude, as did the juvenile court, that D.L. cannot be returned to M.B. because of the extreme likelihood he would again be subjected to physical abuse. We further conclude

the trial court did not restrict or deny M.B. the right to present evidence concerning causation of D.L.'s injuries.

III.

One final issue before us concerns whether the trial court erred in not admitting into evidence the Iowa Supreme Court's decision which affirmed the juvenile court's August 7, 1987, review order. The Iowa Supreme Court held in In re Adkins, 298 N.W.2d 273, 277 (Iowa 1980), that a court in a termination proceeding may take judicial notice of the preceding CINA case. We hold this also includes an appellate court's decision upholding the CINA adjudication.

AFFIRMED.