IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

No. 1999-306 (9-536) / 98-1898
Filed December 13, 1999

IN THE INTEREST OF K.O., Minor Child,

A.S., Mother,
Appellant.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal, Judge.

Mother appeals from juvenile court order terminating her parental rights. She contends the court erred in determining the child could not be returned to her care. **REVERSED AND REMANDED.**

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Heard by Sackett, C.J., and Zimmer and Miller, J.J.

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MILLER, J.

A mother appeals the termination of her parental rights to one child, K.O. She claims the state did not prove by clear and convincing evidence that K.O. could not be returned to her custody as provided in Section 232.102 of the Code of Iowa. The father's parental rights were also terminated, but are not at issue in this appeal. We reverse and remand.

A.S. is the mother of two children, K.O., born October 26, 1987, and M.S., born January 30, 1997. On August 15, 1995 the state filed Child in Need of Assistance (CINA) petition regarding K.O. The statutory grounds alleged were Sections 232.2(6)(b)[1], 232.2(6)(c)(2)[2], and 232.2(6)(n)[3] of the Code of Iowa. The petition alleged adults were using drugs in the home in the presence of K.O., K.O. was hit and threatened with a knife by adults in the home, and physical abuse of K.O. by a maternal uncle. It also alleged K.O.'s unmarried parents had recently "broke up", and K.O.'s mother was staying with different friends. K.O. was placed in the temporary custody of his grandparents, L.O. and N.O. K.O. was subsequently

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[1]Section 232.2(6)(b) provides that a "'Child in need of assistance' means an unmarried child ... [w]hose parent, guardian, other custodian, or other member of the household in which the child resides has physically abused or neglected the child, or is imminently likely to abuse or neglect the child."

[2]Section 232.2(6)(c)(2) provides that a "'Child in need of assistance' means an unmarried child ... [w]ho has suffered or is imminently likely to suffer harmful effects as a result of ... [t]he failure of the child's parent, guardian, custodian, or other member of the household in which the child resides to exercise a reasonable degree of care in supervising the child."

[3]Section 232.2(6)(n) provides that a "'Child in need of assistance' means an unmarried child ... [w]hose parent's or guardian's mental capacity or condition, imprisonment, or drug or alcohol abuse results in the child not receiving adequate care."

adjudicated to be a CINA on October 10, 1995, on each of the three grounds alleged in the petition. A separate order was entered the same day. It continued the temporary removal order, continued K.O. in the temporary legal custody of L.O. and N.O., and provided that K.O.'s parents would be allowed visitation at the discretion of the Iowa Department of Human Services (DHS). A disposition order was entered November 30, 1995. It adopted a case permanency plan and its recommendations. That plan had set a goal of achieving family unification.

On April 12, 1997 the state filed a petition to terminate parental rights with respect to K.O. The petition relied on sections 232.116(1)(c)[4] and 232.116(1)(e)[5] of the Code of Iowa. At the pretrial conference on July 8, 1997, A.S'.s attorney moved to withdraw based on lack of contact with his client. The court granted the motion on

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[4]Section 232.116(1)(c) requires two elements to be proven by clear and convincing evidence before a court may terminate parental rights.

(1) The court has previously adjudicated the child to be a child in need of assistance after finding the child to have been physically or sexually abused or neglected as a result of the acts or omissions of one or both parents, or the court has prevoiusly adjudicated a child who is a member of the same family to be a child in need of assistance after such a finding.

(2) Subsequent to the child in need of assistance adjudication, the parents were offered or received services to correct the circumstance which led to the adjudication, and the circumstance continues to exist despite the offer or receipt of services.

[5]Section 232.116(1)(e) requires four elements to be proven by clear and convincing evidence before a court may terminate parental rights:

(1) The child is four years of age or older.

(2) The child has been adjudicated a child in need of assistance pursuant to section 232.96.

(3) The child has been removed from the physical custody of the child's parents for at least twelve of the last eighteen months, or for the last twelve consecutive months and any trial period at home has been less than thirty days.

(4) There is clear and convincing evidence that at the present time the child cannot be returned to the custody of the child's parents as provided in section 232.102.

the day of trial, July 23, 1997. A.S. did not appear at the trial, although she called the court to report transportation problems. The court proceeded to hear evidence as to the termination of A.S.'s parental rights, and entered its termination order on July 28, 1997. This court subsequently reversed the termination order and remanded for a new trial, finding that not continuing the trial for A.S. to obtain new counsel violated her rights to due process of law. *See In re K.O.*, No. 7-791/97-1526 (Iowa App. March 27, 1998).

During the pendency of A.S.'s appeal from the termination of her parental rights to K.O., the state filed a CINA petition on January 12, 1998 concerning A.S.'s daughter, M.S., alleging that M.S. was a child in need of assistance. It alleged and relied on the same three provisions that it had earlier relied on in the CINA case involving K.O., sections 232.2(6)(b), 232.2(6)(c)(2), and 232.2(6)(n) of the Code of Iowa. As factual support it alleged injury to M.S. in an automobile accident where M.S. was not secured in her child safety seat, K.O. having been removed from A.S.'s home in 1995, and DHS concerns regarding substance abuse by A.S. and the father of the children, M.O. There were also allegations of a violent relationship between the two parents. M.S. was subsequently placed in her grandmother's home when A.S. tested positive for methamphetamine. In an order filed March 10, 1998 the court adjudicated M.S. to be a CINA on each of the three grounds alleged in the petition. An April 16, 1998 disposition order in M.S.'s case required A.S. to complete a substance abuse evaluation and follow all recommendations made, and submit to drug

testing as requested by DHS. It further provided that visitation between M.S. and A.S. be at the discretion of DHS.

Following a review hearing on August 3, 1998, the court confirmed M.S. to be a CINA, but ordered that her legal and physical custody be placed with A.S. The evidence presented, and upon which the juvenile court apparently relied in ordering legal and physical custody of M.S. returned to A.S., included evidence that A.S. had successfully completed the drug treatment, that A.S. had provided clean U.A.'s, that M.S. had severed all ties with M.O., the children's father and the individual with whom she had previously been involved in drug usage, and that A.S. could provide M.S. with a safe home.

Only three weeks after concluding that M.S. could be safely returned to A.S.'s home, on August 21, 1998 the juvenile court held a new trial after remand on the petition to terminate A.S.'s parental rights to K.O. In a written order filed September 21, 1998 the juvenile court terminated A.S.'s parental rights to K.O. pursuant to section 232.116(1)(e) of the Code of Iowa. The juvenile court found that "any reunification with [A.S.] ... would be emotionally harmful to [K.O.] and obviously extremely disruptive." The court also noted that it had only been for the most recent six months that all of A.S.'s urinalyses had been negative for drugs, and two months since A.S. had completed drug treatment. The court further found evidence that K.O. was flourishing at his current placement (with his paternal grandparents), and that K.O.'s grandparents had acted as parent substitutes throughout the past three years.

The juvenile court stated that if termination were not ordered, K.O. would remain a child in need of assistance because any reunification of him with A.S. would have to be supervised and monitored and K.O. would need significant ongoing therapy.

In its September 21, 1998 ruling the trial court concluded that the state had not established the grounds for termination set forth in section 232.116(1)(c), finding that "there is a failure of proof that, as to [A.S.], the conditions which warranted the original adjudication of [K.O.] as a child in need of assistance continue to exist." A.S. appeals the termination of her parental rights under section 232.116(1)(e).

Appellate review of proceeding to terminate a parent-child relationship is de novo; thus it is our duty to review the facts as well as the law and adjudicate rights anew on those propositions properly preserved and presented to us. *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981). We accord weight to the fact findings of the juvenile court, especially when considering the credibility of the witnesses, whom that court heard and observed firsthand, but we are not bound by those findings. *Id.*.

Central to a determination of this nature are the best interests of the child. *Id.* In this connection, we look to the child's long-range as well as immediate interests. *Id.* Hence, we necessarily consider what the future likely holds for the child if returned to his or her parents. *Id.* 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. *Id.*

There is a rebuttable presumption that the best interests of the child are served by custody of the natural parents. Iowa Code § 232.1 (1999); *See also Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599, 606 (1982) ("fundamental liberty interest of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."); *Alsager v. District Court*, 406 F.Supp.10, 16 (S.D. Iowa 1975) (parents possess a fundamental liberty and privacy interest in maintaining the integrity of their family unit), *aff'd in part*, 545 F.2d 1137 (8th Cir. 1976); *In re Chad*, 318 N.W.2d 213, 218 (Iowa 1982). The state bears the burden of proving the necessary elements by clear and convincing evidence. *See In re Chad*, 318 N.W.2d 213, 219 (Iowa 1982); *In re T.B.B.*, 460 N.W.2d 881, 882 (Iowa App. 1990).

Termination of parental rights is a drastic, final step which, when improvidently employed, can be fraught with danger. *Alsager*, 406 F.Supp. at 24. Termination must only occur where more harm is likely to befall the child by staying with his parents than by being permanently separated from them. *Id.* The state has a legitimate interest in protecting the welfare of its minor citizens, but that interest must be balanced against the parents' countervailing interest in being able to raise their children in an environment free from government interference. *Alsager*, 406 F.Supp. at 22.

The juvenile court found, and we find ample support in the record for such finding, that reunification between A.S. and K.O. will take time and effort by all parties, and will involve the services of DHS. In addition, the juvenile court found that reunification would be "emotionally harmful" to K.O. It may thus be argued that termination is in K.O.'s best interests. However, termination may not occur except on a showing (by clear and convincing evidence) of one or more of the statutory grounds that the legislature has established. *In re L.H.*, 480 N.W.2d 43, 47 (Iowa 1992). We turn to the question of whether or not the state has proved one or more of the statutory grounds for termination.

The mother, joined by the guardian ad litem, concedes that the state met its burden with respect to the first three elements of section 232.116(1)(e), but both contend that the state did not prove the fourth element. That subparagraph provides that the court must find:

> (4) There is clear and convincing evidence that at the present time the child cannot be returned to the custody of the child's parents as provided in section 232.102.

Iowa Code § 232.116(1)(e)(4).

In *In re C.K.*, 558 N.W.2d 170 (Iowa 1997) the juvenile court terminated parental rights pursuant to Iowa Code section 232.116(1)(g) (1995). There, as here, the appellants conceded that the first three of four statutory elements had been proved, and the issue was whether or not there was clear and convincing evidence of the

fourth element. The element in question in that case, section 232.116(1)(g)(4) (1995) read as follows:

> (4) 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 at the present time.

As can be seen, that provision is identical to the provision at issue in this case, section 232.116(1)(e)(4) (1999), except for the placement of the phrase "at the present time". That difference is insignificant.

The element at issue in this case, section 232.116(1)(e)(4), brings into play section 232.102. In *In re C.K.*, the Iowa Supreme Court stated that:

> Under Code section 232.102(5) a court may not terminate parental rights unless there is clear and convincing evidence that:
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> a. the child cannot be protected from physical abuse without transfer of custody; or
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> b. the child cannot be protected from some harm which would justify the adjudication of the child as a child in need of assistance and an adequate placement is available.

In re C.K., 558 N.W.2d 170, 172 (Iowa 1997).

Our analysis necessarily focuses on whether the state has proved by clear and convincing evidence facts which support a finding that either paragraph (a) or paragraph (b) of section 232.105(5) applies. The juvenile court made no finding that K.O. could not be protected from physical abuse unless termination occurred. Upon our de novo review, we agree and find the state has not proved paragraph (a) by clear and convincing evidence. We therefore focus on whether there is clear and convincing evidence to conclude that a return to his mother's home would result in

"some harm which would justify the adjudication of [K.O.] as a child in need of assistance." *See, In re C.K.*, 558 N.W.2d 170, 172-73 (Iowa 1997), *In re A.M.S.*, 419 N.W.2d 723, 725 (Iowa 1988), and *In re Chad*, 318 N.W.2d 213, 219 (Iowa 1982).

The state argues that a return to his mother's home would be detrimental to K.O., resulting in emotional harm. The juvenile court recognized as much in its termination order, finding that "any reunification with [A.S.], even if possible, would be emotionally harmful to [K.O.] and obviously extremely disruptive." The juvenile court concluded that "there is clear and convincing evidence that [K.O.] cannot now be returned to [A.S.'s] custody." However, whether or not a child can be returned to a parent's custody turns on whether or not grounds exist at the time of the termination hearing to find that the child is at that time a CINA as defined in section 232.2(6) of the Code. *See, e.g., In re A.M.S.*, 419 N.W.2d at 725 (the proof must only show that any of the alleged definitional grounds of a child in need of assistance in section 232.2(6) exist at the time of the termination hearing).

We can find no provision in section 232.2(6) of the Code that would, at the time of the termination hearing, justify adjudicating K.O. to be a CINA if returned to A.S.'s custody. We readily eliminate those three provisions of section 232.2(6) under which K.O. was originally found to be a CINA because, in declining to terminate under section 232.116(1)(c) the trial court concluded that "there is a failure of proof that ... the conditions which warranted the original adjudication of [K.O.] as a child in need of assistance continue to exist." Upon our de novo review we fully agree with

this conclusion. We also eliminate section 232.2(6)(c)(1), because there was no evidence of any current or recent act or omission by A.S. tha would cause mental injury to K.O. None of the remaining definitions of a CINA in section 232.2(6) have been proved by clear and convincing evidence to apply at the time of the termination hearing. Notably, the juvenile court made no finding that any definition of a CINA did apply at that time.

In *In re Chad*, 318 N.W.2d 213 (Iowa 1982), the juvenile court terminated the mother's parental rights pursuant to what was then Code of Iowa section 232.114(5) (1979), now section 232.116(1)(e) (1999). The Iowa Supreme Court held that the juvenile court's finding that "this young man would suffer emotionally and physically if he was returned to the full-time custody of his mother" did not constitute the finding required by section 232.114(5)(c) (1979) (now section 232.116(1)(e)(4) (1999)). *In re Chad*, 318 N.W.2d 213, 217-18. Accordingly, the juvenile court's finding in this case that reunification would be emotionally detrimental to K.O. does not constitute the finding required by section 232.116(1)(e)(4).

The juvenile court was most likely correct when it found that K.O. could not immediately and unconditionally be returned to A.S.'s custody, that reunification would require supervision and monitoring, and that reunification in all likelihood would require ongoing therapy for K.O. However, a finding that it has been shown by clear and convincing evidence that a child cannot be returned to the custody of a parent "as provided in section 232.102" depends on a finding that if termination is not

ordered the child will be subjected to a form of harm contemplated by section 232.102(5). *In re C.K.*, 558 N.W.2d at 172-73; *In re A.M.S.*, 419 N.W.2d at 725; *In re Chad*, 318 N.W.2d at 219. For reasons previously stated, upon our de novo review we conclude the state has not proved by clear and convincing evidence that K.O. would be subject to a form of harm contemplated by paragraph (a) or paragraph (b) of section 232.102(5) if returned to the custody of A.S. We therefore further conclude the state has not proved by clear and convincing evidence that K.O. "cannot be returned to the custody of [A.S.] as provided in section 232.102", which is required before termination can be ordered.

The juvenile court's order terminating A.S.'s parental rights to K.O. is therefore reversed and this case is remanded to the juvenile court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.