

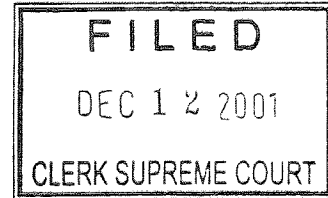
IN THE COURT OF APPEALS OF IOWA

No. 1-724 / 01-0670
Filed December 12, 2001

IN THE INTEREST OF M.Y. AND M.Y., Minor Children,

T.Y., Mother,
Appellant,

J.R.M., Father,
Appellant.



Appeal from the Iowa District Court for Delaware County, Richard R. Gleason, District Associate Judge.

A mother and father appeal from a juvenile court order terminating their parental rights. **AFFIRMED.**

James T. Peters, Independence, for appellant mother.

Monica L. Ackley, Dubuque, for appellant father.

Thomas J. Miller, Attorney General, and Tabitha Gardner, Assistant Attorney General, for appellee – State.

David Baumgartner, Strawberry Point, guardian ad litem for minor children.

Considered by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

ZIMMER, J.

Tanya is the mother of Madison and Montana. She appeals from a district court order terminating her parental rights. She claims the juvenile court erred in determining termination was in the children's best interests. John, the father of Montana, also appeals the termination of his parental rights. In addition to contending that termination was not in Montana's best interest, he also asserts that the Department of Human Services (DHS) failed to make reasonable efforts to reunite him with his child. We affirm.

I. Background Facts and Proceedings.

Madison, born in August 1999, and Montana, born in May 2000, are the children of Tanya. Madison's father remains unknown. Montana's father is John, currently a prisoner at the Mount Pleasant Penitentiary. Because Montana has been in the care of DHS since her birth, she has never been in the custody of either biological parent.

Madison first came to the attention of DHS in February 2000, when a petition was filed seeking her adjudication as a child in need of assistance (CINA). The petition alleged Tanya's failure to exercise a minimal degree of care in supplying her child with adequate food, clothing or shelter and refusing other means made available to provide such essentials. See Iowa Code § 232.2(6)(g) (1999). At the hearing on the State's petition, all parties consented to the CINA adjudication. Madison was returned to her mother's care with the additional safeguards of drop-in visits and other family centered services to be implemented at the discretion of DHS.

In April of 2000, Madison was removed from her mother's care and eventually placed with her maternal aunt. In May 2000, Tanya gave birth to Montana. Montana was born two months premature and remained in the hospital until mid-June. After Tanya's discharge from the hospital, the hospital staff encouraged her to visit Montana frequently, and spend the night with her daughter. Despite this encouragement, Tanya spent only two nights in the hospital with Montana. Tanya also ignored the requirements set forth by the court as conditions to her regaining custody of Madison. She failed to comply with scheduled UA tests and neglected to meet with her Lutheran Social Services counselor.

On June 8, 2000, a CINA petition was filed on Montana's behalf as it was anticipated she would be released from the hospital the following week. At a hearing on June 19, 2000, all parties stipulated to the girls' continued temporary placement with their maternal aunt, subject to the conditions of a court ordered "co-parenting" arrangement. Due to Tanya's disregard of the conditions imposed, this arrangement lasted only two days. Montana and Madison were removed from their aunt's home and placed in foster care. Tanya was given visitation.

At a review hearing on July 26, 2000, the court learned that Tanya's mother, who lived in Texas, requested that Madison and Montana be permanently placed with her in a guardianship. The court ordered an expedited home study concerning the grandmother, while the children remained in foster care. The home study performed in Texas acknowledged the grandmother's troubled past, but found that she was prepared to provide for the needs of her

grandchildren. After considering the report, the district court found that it was in the children's best interests to remain in the custody of their foster family.

In December of 2000, the State petitioned to terminate parental rights. On March 28, 2001, the juvenile court terminated Tanya's parental rights. The court also terminated the parental rights of Montana's father and other putative fathers of Madison. On appeal, Tanya and John argue the court erred in terminating their parental rights. They claim the best interests of the children would be served if the court declined to terminate and instead placed the girls in a long-term guardianship with Tanya's mother in Texas.

II. Scope of Review.

We review proceedings to terminate parent-child relationships de novo. *In re M.N.W.*, 577 N.W.2d 874, 875 (Iowa Ct. App. 1998). Our primary concern is the best interests of the children. *Id.* We look at both the children's long-range and immediate interests in making this determination. *Id.* We necessarily consider what the future likely holds for the children if returned to their parent. *In re K.F.*, 437 N.W.2d 559, 560 (Iowa 1989) (citation omitted). 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.* (citation omitted). The grounds for termination must be shown by clear and convincing evidence. *M.N.W.*, 577 N.W.2d at 875.

III. Best Interests of the Children.

Even if the statutory requirements for termination of parental rights are met, the decision to terminate must still be in the best interests of the child. *In re M.S.*, 519 N.W.2d 398, 400 (Iowa 1994). On appeal, Tanya does not contest the

statutory grounds for termination of her parental rights. The only issue on appeal is whether termination serves the best interests of the children.

Tanya contends the trial court erred in determining that termination was in the children's best interests where an alternative arrangement could preserve family relationships. Tanya argues that if her daughters were placed in a long-term guardianship with her mother in Texas the family could remain in close contact. At trial, Tanya asked the court to consider the exception to termination set forth in Iowa Code section 232.116(3)(a) which states: "The Court need not terminate the relationship between the parent and the child if the Court finds any of the following: (a) a relative has legal custody of the child." Iowa Code § 232.116(3)(a). Section 232.116(3)(a) has been interpreted as permissive, not mandatory. *In re C.L.H.*, 500 N.W.2d 449, 454 (Iowa Ct. App. 1993). It is within the sound discretion of the juvenile court, based upon the unique circumstances before it and the best interest of the children, whether to apply this section. *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa Ct. App. 1997).

After considering the provision, the court nonetheless terminated parental rights, and ordered the children remain in foster care. There was conflicting evidence regarding the stability of the grandmother's home life. There was no indication that living in Texas would foster a familial bond with the girls' siblings who reside in Iowa. The foster family has expressed a willingness to develop these relationships. The foster family has also expressed an interest in adopting the children. The children's options for permanent placement are clearly enhanced by the decision to terminate parental rights. We agree with the

juvenile court's conclusion that the children's best interests require the termination of existing parental rights.

IV. Father's Reasonable Efforts Claim.

Montana's father asserts on appeal that DHS failed to make reasonable efforts to reunite him with his child. After it was determined that he was Montana's father, DHS included John in the case permanency plans developed in Montana's case. While incarcerated, and represented by counsel, John was given the opportunity to comment in writing to the case permanency plans dealing with the services provided for his daughter and her future care. He signed off on the plans without comment. He did not request services and declined to comment on any problems or concerns he had with her case plan. We agree with the State that John has failed to preserve error on this issue.

Despite John's argument, we do not find this case analogous to the situation presented in *In re S.J.*, where an incarcerated father took steps to better himself, asked for visitation, and requested that if his child's custodial arrangement was changed, that the child be placed with an older sibling. See *In re S.J.*, 620 N.W.2d 522 (Iowa Ct. App. 2000). The record indicates John has shown little concern in his daughter's development, and has not been involved in her life. He has not sought contact with her. He has never requested services that would promote his being reunified with her. We affirm the juvenile court's finding that termination of John's parental rights is in Montana's best interest.

AFFIRMED.

000518