IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 6-496 / 96-0255

**IN THE INTEREST OF T.W.,
J.H., and T.J.W., Minor Children,**

T.H., Mother,

Appellant,

T.W., Father,

Appellant.

Appeal from the Iowa District Court for Scott County, John G. Mullen, Judge.

Mother and father appeal the juvenile court's order terminating their parental rights. **AFFIRMED.**

Barbara E. Maness, Davenport, for appellant-mother.

Donna M. Humpal of M.W. Liebbe Law Office, Davenport, for appellant-father.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, and Henry C. Filseth, Assistant County Attorney, for appellee-State.

Jan Roemer, Davenport, guardian ad litem for minor children.

Heard by Cady, P.J., and Huitink and Streit, JJ.

HUITINK, J.

T.H. and T.W. appeal the termination of their parental rights as to their children, T.W., J.H., and T.J.W. We affirm.

T.H. and T.W. are the parents of three minor children: J.H., born on August 30, 1992; T.W., born on September 6, 1993; and T.J.W., born on October 1, 1994. T.W. and T.H. met in 1990 and later began cohabitating. The couple never married.

In May 1994, a child abuse investigation was initiated as a result of the mother's failure to keep two medical appointments for J.H. In March, J.H. was discharged from the hospital after a diagnosis of failure to thrive, microencephaly, speech delay, and ventricular septal defect. The treating physicians concluded that J.H.'s feeding difficulties and developmental problems were caused in part by the mother's poor feeding habits and the lack of structured meal times.

On May 6, 1994, the children were removed from the mother's care after a visit to the home by an investigator. The mother was not home, and the children had been left in the care of two adolescent females. Two young unidentified males were also present. The home was in a filthy and hazardous condition. The investigator discovered that numerous calls to the police had been made concerning activities at the apartment. Furthermore, it was reported that gang members had been frequenting the mother's residence. It was also later discovered that the two teenage girls were half-sisters of the mother who were runaways from a juvenile shelter. The girls reported

that the mother drank constantly and was gone days and nights with a boyfriend in Illinois. As a result of these discoveries, J.H. and T.W. were removed from the home.

At the time of the investigation, the father, T.W., was incarcerated at Fort Madison where he had been serving a sentence for two driving while barred convictions since January 1994. T.W. has a long criminal record and a history of alcohol problems. The parole board decided to release him to a work release program in April 1995. However, T.W. was involved in an altercation with another inmate and lost six months of good time. His release date was postponed until August 1996.

The mother gave birth to T.J.W. in October 1994. Due to concerns regarding her inability to properly feed and care for the child, the baby was immediately placed in foster care.

In November 1994 a dispositional hearing was held, and the court adjudicated J.H. and T.W. as children in need of assistance pursuant to Iowa Code sections 232.2(6)(c)(2), 232.2(6)(e), and 232.2(6)(g). On the same day, T.J.W. was adjudicated a child in need of assistance pursuant to sections 232.2(6)(b), 232.2(6)(c)(2), 232.2(6)(e), and 232.2(6)(n).

A dispositional hearing was held with respect to T.J.W. in January 1995 at which the court found that T.H. had difficulty meeting her own needs due to her limited living skills. The court also found that she had been resistant to remedial services in the past. At that time, T.H. proposed a home study of relatives with whom she and the

child could live. The court had no objection to the study but indicated that such an arrangement would be contingent on the willingness of the family members to parent both the infant and the mother for a long-term placement and also the mother's receptiveness to such a placement.

In September 1995, a petition for termination of parental rights as to both parents was filed. A hearing was held in December of 1995 at which the mother was present with counsel. The father was incarcerated at the time but was represented by counsel.

Based on T.W.'s past record of substance abuse and arrests and also his current inability to provide for the needs of his children, his parental rights were terminated. The court also added that the children should not "wait in limbo on the chance" that the father would change his lifestyle upon his release from prison. The court found that T.H. had refused or had been unable to recognize the problems and issues for herself and her children. Her lifestyle was characterized as "chaotic", "nomadic", and "hand-to-mouth". The court noted that J.H.'s and T.W.'s special needs demanded a structured environment that the mother was unable to provide. Both parents' rights as to all three children were terminated pursuant to Iowa Code sections 232.116(1)(c), 232.116(1)(g), and 232.117.

T.H. appeals the juvenile court's order asserting that the state failed to make reasonable efforts to reunify her with the children. She also argues that termination was

not in the best interest of the children. T.W. appeals alleging similar errors in addition to a claim that he was denied due process when the court held the hearing in his absence despite a prior court order facilitating his attendance. We will address the mother's arguments first.

Appellate review of termination proceedings is de novo. *In re W.G.*, 349 N.W.2d 487, 491 (Iowa 1989), *cert. denied sub nom., J.G. v. Tauke*, 469 U.S. 1222 (1985). We give weight to the findings of fact made by the juvenile court, but we are not bound by them. *Id.* at 491-92.

T.H. contends that although she was provided with services under the Case Permanency Plans adopted by the court, the services were not tailored to meet the special circumstances of her case. There is evidence in the record indicating that T.W. has limited intellectual functioning and alcohol problems. There is also evidence that the two older children have significant physical and developmental abnormalities. She argues that intensive homemaker services should have been offered. Furthermore, T.H. argues that she was never given the opportunity to care for her youngest child who has not exhibited a need for special care. Since June 1995, T.H. has been residing with her stepfather, grandfather, and sister in Davenport. She claims that the possibility of living with the children in the home of another family member or other responsible adult was never explored.

The State is required to make reasonable efforts to reunite the parent and child prior to termination. *In re C.L.H.*, 500 N.W.2d 449, 453 (Iowa App. 1993). In proceedings to terminate parental rights, the reasonableness of services the State has offered in an effort to preserve the family should be very carefully scrutinized. *In re C.D.*, 508 N.W.2d 97, 100 (Iowa App. 1993).

Upon careful review of the record, we find that the State made reasonable efforts to reunite T.H. with her children. While we acknowledge that mental disability alone is not sufficient reason to terminate parental rights, we conclude that T.H. was offered an abundance of services to address her special needs in addition to the needs of her children. These services include a visiting nurse, Visiting Nurse Life Skills program, alcohol treatment, Lutheran Social Services assistance, Family Development Program, Women, Infant & Children Services, and vocational rehabilitation services. However, T.H.'s cooperation with these programs was minimal at best and no progress was made.

The failure of the parents to comply with DHS's case plan cannot be an independent ground to terminate parental rights. *In re J.L.P.*, 449 N.W.2d 349, 352 (Iowa 1989). However, that failure can be considered as evidence of the parent's attitude toward addressing the problems that resulted in the loss of custody in the first place. *Id.*

We are not persuaded by the mother's arguments that extra services were required considering the circumstances. The record does not indicate that the mother

ever raised this issue at the dispositional and review hearings, except for her request for a home study of her family members. T.H. had an obligation to demand services prior to the termination hearing, including additional homemaker services if she felt such assistance would be beneficial. *In the Interest of B.K.K.*, 500 N.W.2d 54, 57 (Iowa 1993); *In the Interest of L.M.W.*, 518 N.W.2d 804, 807 (Iowa App. 1994). It is too late to challenge a reunification plan at the termination hearing. *In re L.M.W.*, 518 N.W.2d 804, 807 (Iowa App. 1994).

The court noted T.H.'s request for a home study but the record does not reveal that she ever pursued the matter later with DHS. Furthermore, there is evidence that T.H. has claimed that her stepfather with whom she resided abused her in the past. It was also discovered that her stepfather's two daughters were runaways from a juvenile home. The available information concerning T.H.'s current living arrangement indicated that it was not a suitable placement.

T.H. also argues that termination of her parental rights was not in the best interests of the children. She has raised the issue of the adoptibility of the children. T.H. also complains that she was never provided with an opportunity to care for T.J.W. Finally, T.H. revisits her claim that a placement with another responsible adult or family member would enable her to handle the responsibilities of caring for the children.

The primary concern in termination proceedings is the best interest of the child. Iowa R. App. P.14(f)(15); *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981):

> We look to the child's long-range, as well as immediate interests. We consider what the future 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 the parent is capable of providing. Our statutory termination provisions are preventative as well as remedial. They are designed to prevent probable harm to a child.

In re R.M., 431 N.W.2d 196, 199 (Iowa App 1988) (citing *Dameron*, 306 N.W.2d at 745).

We find that the juvenile court correctly determined that termination of T.H.'s parental rights was in the best interest of the children. The record reveals that T.H. missed several visits with the children in 1995 prior to the termination hearing. During the visits she did attend, T.H. demonstrated an inability to handle the children's behavioral problems. We have already determined that she failed to propose a suitable placement option in conjunction with her home study request. Furthermore, we are not persuaded by her argument that the children will not be easily placed in adoptive homes. A finding that a child is adoptable is not a prerequisite to termination of parental rights. *In the Interest of T.C.*, 522 N.W.2d 106, 109 (Iowa App. 1994). There is substantial evidence establishing that the two older children failed to thrive while in the mother's care. We find that these concerns far outweigh any concerns about the adoptability of the children. We conclude that the State produced clear and convincing evidence supporting the termination of T.W.'s parental rights and affirm.

T.W. also asserts that the termination was not in the children's best interest. He claims that prior to his incarceration he was a capable parent and that the family did not come to the attention of DHS until after he began serving his sentence. T.W. asserts that while in prison he sought counseling in anger management and substance abuse. He also kept in contact with the caseworkers while in prison and sent gifts and cards to the children. T.W. is scheduled to be released from prison no later than August of 1996 and at that time he requests to be given an opportunity to demonstrate his improved ability to parent his children. Finally, he makes an argument concerning the difficulties in placing the children in an adoptive home.

T.W. further alleges that DHS did not make reasonable efforts to facilitate reunification with his children after his release from prison. He complains that a parenting class was not offered at the prison facility, and DHS failed to provide him with substitute parenting materials per his request. T.W. claims that DHS was never clear about what was expected of him and simply neglected him because of the difficulties posed by his incarceration.

We are convinced that T.W. has received adequate remedial services to the extent possible considering his incarceration. DHS kept him apprised of his children's whereabouts and their progress during the time he was in prison. Furthermore, he has been the recipient of the programs at the prison facility relevant to his specific needs, namely alcohol abuse and anger management.

The record indicates that T.W. is solely responsible for the obstacles to reunification. He has an extensive criminal record dating back to 1992 that includes driving while barred, drunk driving, traffic hit and run, and other traffic-related offenses. *See In the Interest of J.S.*, 470 N.W.2d 48, 51 (Iowa App. 1991) (incarcerated parent must take responsibility for conduct leading to the confinement). Furthermore, he has been less than forthcoming with the caseworkers about the extent of his alcohol problem. While incarcerated, he forfeited an opportunity to be released on parole after he was involved in an altercation with another inmate. T.W.'s failure to achieve the earliest release possible demonstrates his lack of commitment to his children. We will not force the children to endlessly await T.W.'s decision to make the necessary commitment essential to reunification. *See In re T.D.C.*, 336 N.W.2d 738, 744 (Iowa 1983).

The father's claim that he was a capable parent prior to his incarceration is belied by reports of drinking problems in the home following J.H.'s birth in 1992, J.H.'s medical problems and failure to thrive prior to T.W.'s incarceration, T.W.'s previous resistance to services, and his previous inability to appreciate the medical needs of the two older children. T.W.'s troubled history as a parent demonstrates the unlikelihood that he will be able to successfully parent these children upon his release from prison. *See In re R.M.*, 431 N.W.2d at 199 (past performance may be indicative of quality of future care parent is capable of providing). Accordingly, we concur in the

juvenile court's determination that termination of his parental rights is in the best interest of J.H.; T.W., and T.J.W.

Our conclusion is not altered by T.W.'s argument based on the problems associated with obtaining a permanent placement for the children. Assuming that such difficulties do in fact exist, the potential delay becomes an insignificant factor when compared to the delay created by the father's incarceration. To continue placement in long-term foster care awaiting his release is not in the best interests of the children. *See In the Interest of J.L.P.*, 449 N.W.2d 349, 353 (Iowa 1989).

Finally, T.W. argues that his due process rights were violated by the court's refusal to grant a continuance in order to permit him to attend the hearing. He had been granted an order by another judge permitting his transportation to the hearing. The record indicates that the order was lost by the sheriff's office and T.W. was therefore not transported to the hearing. The juvenile court decided not to continue the matter because it would delay the disposition another two months.

We are troubled by the fact that the agency responsible for T.W.'s transfer failed to carry out a court order permitting his attendance at the hearing. However, the decision to grant the continuance to remedy the error was within the discretion of the juvenile court. *Michael v. Harrison County Rural Electric Cooperative*, 292 N.W.2d 417, 419 (Iowa 1980). A district court's ruling on such matters is presumptively

correct, and a party challenging the ruling has a heavy burden to overcome the presumption. *Id.*

We do not find that the juvenile court abused its discretion in denying the motion to continue. The court correctly concluded that the presence of the father was not mandatory since he did not have an absolute right to be physically present. *See In the Interest of J.S.*, 470 N.W.2d 48, 51 (Iowa App. 1991). T.W.'s due process rights were adequately addressed by the court's decision allowing him to participate by deposition. Furthermore, he was represented by counsel. The on-going foster home placement of the children since May 1994 called for urgency in the proceedings. We affirm the decision not to continue the trial to permit his attendance.

We affirm the juvenile court's order in its entirety.

AFFIRMED.