IN THE COURT OF APPEALS OF IOWA

FILED
AUG 30 1996
CLERK SUPREME COURT

No. 6-494 / 95-2014

IN THE INTEREST OF E.R.B.
and N.M.R., Minor Children,

P.R., Father,
Appellant,

D.W., Grandmother,
Appellant.

Appeal from the Iowa District Court for Woodbury County, Brian Michaelson, Associate Juvenile Judge.

Father appeals juvenile court's order terminating his parental rights over his minor children. The paternal grandmother appeals decision to remove children from her custody. **AFFIRMED**

Mayer Kanter, Sioux City, for appellant-father.

Lester J. Gurdin, Sioux City, for appellant-grandmother.

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

Joseph Kertels, Sioux City, guardian ad litem for minor children.

Considered by Habhab, P.J., and Huitink and Streit, JJ.

STREIT, J.

This is an appeal from the juvenile court's terminating the parental rights of a father incarcerated in prison most of his children's lives and from the court's denial of custody being placed with his mother. Paul and Quanda are the parents of the two children involved in this appeal, Natasha. born October 1990 and Elaine born September 1991. Quanda consented to termination of her parental rights and is not a party on appeal.

In January 1992 Natasha and Elaine were removed from their mother's care pursuant to an emergency removal order. At the time, the girls and their mother were residing with Diane, the paternal grandmother. Paul was incarcerated since December 1991 for a five year indeterminate sentence. Elaine was diagnosed as inorganic failure to thrive, and Natasha was determined to be developmentally delayed. Following the removal hearing, the juvenile court found the children could be returned to Quanda's care so long as specific conditions were met and Quanda continued to reside with Diane or her mother.

In March 1992 the parties stipulated that both girls were children in need of assistance. The court continued the girls' placement with Quanda so long as the same conditions were met. The Department of Human Services was to provide supervision.

In June 1994 Paul was released from prison and placed on parole, but was incarcerated again in August 1994. In September 1994 DHS recommended that the

goal be reunification with Quanda and the children were placed in the temporary custody of Diane with continued supervision by DHS.

In May 1995 the State filed a petition for termination of Paul and Quanda's parental rights. Diane was allowed to intervene. In July 1995 an in-home service provider recommended that the placement with Diane be carefully reviewed, and several concerns were reported. DHS recommended that parental rights be terminated and that the girls be placed in an adoptive home other than Diane's. The court terminated Paul and Quanda's parental rights and ordered that custody of the children be immediately transferred to the DHS for adoptive placement.

Paul appeals the juvenile court's order terminating his parental rights and argues the court erred in: (1) finding it was in the children's best interests to terminate his rights; and (2) considering and taking judicial notice of several of the State's exhibits. Diane, the children's paternal grandmother, also appeals asserting the court erred in: (1) finding it was not in the children's best interests to remain in her custody after termination of both parents' rights; and (2) relying on her prior history in making the decision to remove the children from her custody.

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 (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. Termination of Parental Rights of Paul

Paul contends it is not in the best interests of his children to terminate his parental rights. The Iowa Supreme Court has often recognized that there exists a parental interest in the integrity of the family unit, but that such interest is not absolute and may be forfeited by certain conduct. *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981). The State has the duty to see that every child within its borders receives proper care and treatment, and must intercede when parents abdicate that responsibility. *In re I.L.G.R.*, 433 N.W.2d 681, 689 (Iowa 1988). "Every child deserves a safe, healthy and stimulating environment in which to grow and mature." *In re J.W.D.*, 456 N.W.2d 214, 217 (Iowa 1990). "So the statutory presumption that a child's best interest will be served by leaving the child with the child's parent is not conclusive." *In re L.L.*, 459 N.W.2d 489, 494 (Iowa 1990).

Paul has failed to have any significant or meaningful contact with either Natasha or Elaine. He has been in prison for a majority of the past five years during his children's formative years and presently is incarcerated at the Iowa Men's Reformatory scheduled for discharge in 1997. Paul's contact with the children during his incarceration has been sporadic at best. While released from prison in 1994, instead of building a relationship and caring for his children, he returned to illegal activities leading to his present incarceration. In a termination proceeding we cannot ignore "the relentless passage of time." *In re M.R.*, 487 N.W.2d 99, 102 (Iowa App. 1992) (citing

In re A.C., 415 N.W.2d 609, 613 (Iowa 1987)). "The crucial days of childhood cannot be suspended while parents experiment with ways to face up to their own problems." *Id.* Paul has refused to participate in parenting classes recommended by DHS and made no reasonable efforts to resume care of the children despite being given the opportunity to do so.

Although it is not our place to pass moral judgment, it is the function of this court to intervene when a parent's overall life-style is harmful to a child's best interests. *See In re Rice*, 236 N.W.2d 40, 43-44 (Iowa 1975); *In re O'Neal*, 303 N.W.2d 414, 422 (Iowa 1981). Paul has a history of violence and unlawfulness. He appeared in juvenile court as a child, and spent approximately five years in various residential facilities during his adolescence. He was incarcerated on criminal mischief charges in 1991 and most recently incarcerated in 1995 for theft. This pattern of behavior is not consistent with someone who is able to provide a secure, stable, and healthy home for his children. It is clearly in the best interests of Natasha and Elaine to terminate the parental rights of Paul.

Paul also objects to the court taking judicial notice of reports admitted in the Child In Need of Assistance (CINA) hearing. "To be capable of being judicially noticed a matter must be of common knowledge or capable of certain knowledge." *In the Interest of H.G.*, 534 N.W.2d 113, 114 (Iowa App. 1994) (quoting *Motor Club of Iowa v. Dept. of Transp.*, 251 N.W.2d 510, 517 (Iowa 1977)). It is permissible for a

trial court in a termination hearing to take judicial notice of evidence in an underlying CINA case. *In the Interest of Adkins*, 298 N.W.2d 273, 277-78 (Iowa 1980). Paul's own testimony corroborated and verified information in the reports.

II. Change in Custody

Diane, paternal grandmother of Natasha and Elaine, claims the court erred in finding that it was not in the best interests of the children to remain in her custody once parental rights had been terminated. The juvenile court is charged with the responsibility to exercise its discretion in determining "relative or other suitable persons" as contemplated by § 232.17(3), *In Interest of C.L.C.*, 479 N.W.2d 340, 344 (Iowa App. 1991). Diane has failed to demonstrate that she can provide a secure, stable, and healthy home for the children granting her custody upon termination of parental rights.

History and characteristics of grandparents as parents may "militate" against a grandparents request for consideration as an adoptive parent. *In Interest of J.M.W.*, 492 N.W.2d 686, 690 (Iowa 1992). Determination of parenting ability must necessarily be based on what is likely to occur in the future not only because of present conditions but also because of what has occurred in the past. *Id.* at 690. Diane claims the district court erred when it considered her past history as a parent in the decision to remove Elaine and Natasha from her custody.

We must consider what the future holds for a child. "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." *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981). Three of Diane's adult sons have delinquency/criminal records and two of her children have been physically and sexually abused while in Diane's care. Significant evidence of past ineffective parenting, coupled with the concerns of the present, support the district court's decision for removing the children from the custody of Diane.

The Court must be assured the child is in an environment that is likely to bring her a healthy, physical, mental and social maturity. *In Interest of V.F.*, 490 N.W.2d 87, 89 (Iowa App. 1992). The children lived with Diane and Quanda in 1992 when they were removed from the home and placed in emergency foster care. Elaine was severely malnourished and received a diagnosis of organic failure to thrive. Natasha. was filthy, pathetic looking and had a rash about her body. Child Protective Services found the residence dirty and very cluttered.

While Diane has exhibited much more care for the children than Quanda or Paul, the Court is not convinced she can provide for the needs of the children.[1] Diane claims she has been the primary care giver to the children. She failed, however, to intervene

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[1]The responsibilities of this household are formidable. Members of Diane's household include her husband, two adult sons, a minor daughter, a 50 year old mentally and physically handicapped brother, and probably Paul upon his release from prison.

on the children's behalf even when Elaine's condition deteriorated to the point of needing hospitalization. Diane's failure to intervene while the children were in such pathetic condition[2] demonstrates the lack of stability, nurturing and care for the children.

Further, there is considerable risk if Diane were given custody then Quanda and Paul would have unsupervised access to the children. In 1993, Diane allowed Paul to stay at her home in violation of his parole while he was at a residential treatment facility. During this period of time Diane permitted unsupervised visitation of Paul with Natasha. and Elaine. Diane further allowed Paul to visit the children on a regular basis even when a no-contact order was in place. This past conduct demonstrates Elaine and Natasha would most likely continue to have contact with their mother and father. We would only be setting the stage for future harm and further regression of the girls than has already occurred if Diane were granted custody.

Although Diane loves these children, it is in their best interest to remove them from her custody to give them the opportunity to experience the security, stability and safety an adoptive home can provide. The juvenile court did not abuse its discretion in not placing the children with Diane.

AFFIRMED

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[2] A pediatric nurse stated that in her 20 years of nursing she had never seen a child in such a pathetic condition. The nurses handling the child wore gloves because of the filth and body rash.