IN THE COURT OF APPEALS OF IOWA

No. 6-215 / 95-2131

000313

IN THE INTEREST OF S.J.V.,

Minor Child.

L.B.T., Father.

Appellant.

FILED
APR 23 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Artis Reis, Associate Juvenile Judge.

Father appeals the juvenile court's termination of his parental rights over his minor child. **AFFIRMED.**

Trevor T. Hook of Sinclair & Associates, West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Diane Stahle, Special Assistant Attorney General, Maureen McGuire, Assistant Attorney General, and Jaki Livingston, Assistant County Attorney, for appellee-State.

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

HABHAB, P.J.

Tracy and Lewis are the parents of S.J.V., born July 27, 1992. Tracy and Wayne are the parents of S.J.V.'s half-siblings, C.L.V. and R.L.V., with whom S.J.V. has always lived. Lewis is the father of two other children with whom S.J.V. has had some contact during visits with his paternal grandmother, Vicki.

On May 8, 1994, the court ordered that C.L.V., R.L.V., and S.J.V. be removed from Tracy's care based on C.L.V. testing positive for cocaine. The children were placed with Tracy's maternal aunt and uncle. On May 27, 1994, the children were adjudicated children in need of assistance pursuant to Iowa Code sections 232.2(6)(c)(2), (6)(n), and (6)(o) (1993). Following a dispositional hearing in August 1994, the children were placed in the custody of the Department of Human Services (DHS).

In August 1995, the State filed a petition for termination of Tracy's parental rights over S.J.V., C.L.V., and R.L.V.; Wayne's parental rights over C.L.V. and R.L.V.; and Lewis's parental rights over S.J.V. The court granted Vicki's motion to intervene.

Following a November 1995 hearing, the court found Tracy and Wayne consented to the termination of their parental rights. It noted Lewis opposed termination of his parental rights. However, it found Lewis was currently incarcerated, had only seen S.J.V. a few times, and had never cared for or supported him. The court noted, although Vicki opposed termination of Lewis's rights, she

testified she "really wished to be a grandmother to the child, not the custodial parent." The court found that S.J.V., C.L.V., and R.L.V. had been placed in the same foster home and their foster parents wished to adopt them and were sensitive to S.J.V.'s need for exposure to his African-American culture. The court ordered Lewis's parental rights terminated pursuant to Iowa Code section 232.116(1)(g) (1995).

Lewis appeals.

Appellate review of termination proceedings is de novo. *In re W.G.*, 349 N.W.2d 487, 491 (Iowa 1984) *cert. denied sub nom. J.G. v. Tauke*, 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. 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).

Iowa Code section 232.116(1)(g) (1995) permits the juvenile court to terminate the parent-child relationship if the court finds all of the following have occurred:

> (1) The child is three years of age or younger.
> (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 six months of the last twelve months, or for the last six consecutive months and any trial period at home has been less than thirty days.
> (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.

The only element of section 232.116(1)(g) which Lewis disputes is the final element regarding clear and convincing evidence the child cannot be returned to the parents. Lewis contends he was unable to visit the child for various reasons and the family unit could be preserved by putting S.J.V. in Vicki's custody until he is released from prison.

There exists a parental interest in the integrity of the family unit, but this 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). The termination statutes are preventative as well as remedial. *Dameron*, 306 N.W.2d at 745. "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). Insight for the determination of whether a child can be returned to the parent is to be gained from evidence of the parent's past performance, for it is that performance which may be indicative of the quality of future care that parent is capable of providing. *L.L.*, 459 N.W.2d at 493-94. "Children cannot wait for responsible parenting. Parenting cannot be turned off and on like a spigot. It must be constant, responsible, and reliable." *Id.* at 495.

Lewis testified it would be difficult for him to be a parent at the present time since he is currently incarcerated. Our supreme court has stated, however,

incarceration cannot be used as a justification for the lack of a relationship between a parent and a child. *In re M.M.S.*, 502 N.W.2d 4, 8 (Iowa 1993). According to testimony given by Vicki, Lewis knew of S.J.V. within thirty days of S.J.V.'s birth. Yet, since S.J.V.'s birth, Lewis has only seen the child a total of four times. Lewis has never provided any financial support for the child. Lewis has not sent S.J.V. any birthday cards, he sent Christmas presents on one occasion, and he never phoned the child.

Sheri O'Boyle, a DHS social worker, testified she made attempts to get Lewis involved in S.J.V.'s life from the time she received the case in September 1994. Lewis was given responsibilities in every case permanency plan prepared and copies of these plans were sent to Lewis at Vicki's address. Lewis did not meet the requirements in any of these plans and he made no known attempts to contact DHS regarding the plans or his responsibilities prior to August 1995. Despite the fact Lewis was provided legal representation and given notice of the hearings, he did not attend CINA hearings concerning S.J.V. until the termination hearing.

Lewis contends Vicki should be given custody of S.J.V. until he is released from prison. Vicki admitted in testimony she has always held the view she would rather be a grandparent than a parent. We also find Lewis's past history of failing to make any meaningful attempts to establish a relationship with S.J.V. is indicative of his ability and desire to parent S.J.V. in the future. S.J.V. has always lived with his half- siblings, R.L.V. and C.L.V. He has never lived with his paternal half-siblings.

S.J.V. is currently in a foster home with R.L.V. and C.L.V., and the foster parents have expressed a willingness to adopt all three children. We conclude it would be in S.J.V.'s best interests to keep him united with R.L.V. and C.L.V. rather than placing him in Vicki's care until Lewis is released from prison.[1]

Accordingly, we affirm the district court's ruling terminating the parental rights of Lewis pursuant to Iowa Code section 232.116(1)(g).

AFFIRMED.

[1] We note the guardian ad litem takes the position that the district court's decision to terminate the parental rights should be affirmed.