FILED
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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

IN THE INTEREST OF)
DAVID SIMMONS,)
A Child) Filed May 31, 1978
STATE OF IOWA,) 526
Appellant.) 3-61264

Appeal from Linn District Court - Brent G. Harstad, Judicial Magistrate.

State appeals from order of trial court refusing to terminate parent-child relationship. Affirmed.

Richard C. Turner, Attorney General, Stephen C. Robinson, Special Assistant Attorney General, Theodore R. Boecker, Assistant Attorney General, and Orville Caruthers, Assistant Linn County Attorney, for appellant.

John C. Platt, of Cedar Rapids, for appellee.

James Piersall, of Cedar Rapids, guardian ad litem for the child.

Submitted to Allbee, C.J., Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

The State appeals from the October 6, 1977 order of the juvenile court dismissing, without prejudice, its petition to terminate the parent-child relationship existing between Carrie Simmons and her son David. Our review is de novo. In Interest of Kelley, 262 N.W.2d 781, 782 (Iowa 1978); In Interest of Wardle, 207 N.W.2d 554, 557 (Iowa 1973). Our primary concern is the best interest of the child. Long v. Long, 255 N.W.2d 140, 143 (Iowa 1977).

I. The child, David, was born January 10, 1968, to Carrie and Paul Simmons. The parents subsequently separated; at the time of the proceedings below Paul was deceased. In 1974 Carrie was unemployed and living in Chicago with David. Their apartment was burglarized, everything of value stolen. Carrie and Paul then moved to Cedar Rapids where her adult son, Larry, lived with his wife, Louise, and their children.

By affidavit filed January 21, 1975, the Linn County Department of Social Services requested that temporary custody of David be placed in the department pursuant to § 232.7, The Code 1973. The affidavit presented a police report to support the invocation of this emergency procedure. This report indicated that the police had been called at 5:00 p.m. that day by a person who indicated that seven year old David was "wandering" in the caller's neighborhood. The police took David to the Allison Hotel where he and Carrie resided. David was apparently afraid to enter the room, stating that his mother beat him when she was drunk. He also said he had not eaten since the previous day. Upon entering the room the officers found Carrie to be "very intoxicated," and the room filthy and littered with beer cans.

The following day the county attorney filed a petition alleging David to be a neglected child within §§ 232.2(15)(b), (c), (d), The Code 1973. That same day the application for temporary custody was granted and hearing on the neglect petition set for March 12, 1975. Carrie, upon application, was given court appointed counsel. After hearings, on March 25, 1975, David was found to be a neglected child. The court requested quarterly reports from the Department of Social Services regarding Carrie.

During the spring of 1975, social workers reported no change in Carrie's lifestyle. She was 51 years old, unemployed, unskilled, and had a back injury. In June of 1975, a second social worker began working with Carrie. It was suggested Carrie attend the

Vocational Rehabilitation Program at Oakdale. The program provided food and shelter, and included a period of evaluation and a period of skill development. Carrie visited the facility and rejected the suggestion. She justified this action on the grounds that she would be away from her son, be paid nothing during the evaluation stage and only $4 per week during the training stage, that she was penniless, and that the program contained no job guarantee. In the summer of 1975 David was placed in the home of Carrie's son Larry; Carrie, seeking to improve her financial position, returned to Chicago. David has remained in the Larry Simmons home for the past three years.

During the two years after her return to Chicago, Carrie's financial status remained poor. She worked occasionally as a babysitter, personal companion, and day laborer. She receives $174 per month general assistance from the Cook County Department of Social Services and a food stamp allotment. She contributed no support for David during the period, sent him a few presents, and visited him seldom, usually unannounced. Animosity developed between Carrie and her daughter-in-law, Louise. The only contacts between Carrie and the Linn County Department of Social Services during this period were by mail. The letters indicate Carrie's financial plight, her desire to regain custody of David, and a lack of understanding of both the reasons why David was taken from her and what she need do to secure his return.

On February 25, 1977, the Linn county attorney requested the juvenile court to adopt 11 broadly stated standards regarding Carrie's behavior as conditions precedent to David's return to her. Compliance with the standards within six months was required. After a March 23, 1977 hearing, of which Carrie was notified but failed to attend, the suggested standards were adopted by the court. Carrie was sent a copy of the order. The termination petition was filed July 19, 1977. The grounds alleged were violations of §§ 600A.8(4),(6), The Code; that Carrie had failed or refused to provide adequate care and living environment for David, and that she had failed to comply with the standards adopted by the court.

II. The juvenile court dismissed the termination petition and found the best interest of David required continuation of the placement by the Department of Social Services in the foster home of the Simmons family. We agree and affirm the trial court. The petitioner in a termination case must establish a factual basis for the drastic action by clear and convincing evidence. Long v. Long, 255 N.W.2d 140, 143-44 (Iowa 1977). There exists a rebuttable presumption that the best interest of the child is

to be with its parents. However, the State, as parens patriae, has the duty to see that every child within its borders receives proper care and treatment, In Interest of Wardle, 207 N.W.2d 554, 556 (Iowa 1973).

We agree with the trial court that Carrie should not have custody at present but that the State has not shown by clear and convincing evidence that her parental rights should be terminated. Carrie has lived essentially from hand to mouth for at least the last four years. The economic advantages available to David in his brother's home are unquestionably superior to those Carrie can presently offer. However, financial discrepancy cannot serve as a basis for terminating a parent-child relationship. In Interest of Wardle, 207 N.W.2d 554, 564 (Iowa 1973). Nor should Carrie be penalized for her choice to return to Chicago, her home for more than 30 years.

Little evidence is presented by the State regarding Carrie's present relationship with David. In addition, little is known of Carrie's present life in Chicago. The only evidence thereof is an affidavit by a Linn county juvenile authority who was ordered to give unannounced personal notice of the termination action to Carrie in Chicago. He found her apartment small but clean, and Carrie well dressed. Carrie's testimony reveals her desire to have David with her as well as her deep frustration with the legal process. She is participating in a vocational training program which will ensure her employment. She testified that she does not drink to excess. David asks about her often. It does not appear that Larry and Louise Simmons are trying to take David from Carrie. In fact the practical effect of legal termination would probably be minimal. The record reflects the difficulty of the Iowa authorities attempting to guide a person living in another state. This difficulty, caused by distance, cannot support termination of parental rights in the present case.

AFFIRMED.