

IN THE COURT OF APPEALS OF IOWA

No. 4-326 / 94-0169

FILED

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CLERK SUPREME COURT

IN THE INTEREST OF B.W. and J.W., Minor Children,

R.W., Father,

Appellant,

J.W., Mother,

Appellant.

Appeal from the Iowa District Court for Fayette County,
Alan D. Allbee, Associate Juvenile Judge.

J.W., the mother, and R.W., the father, appeal from a
termination of their parental rights to B.W. and J.W.
AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

T. David Katsumes, Elgin, for appellant-father.

Jeffrey E. Clements, West Union, for appellant-mother.

Bonnie J. Campbell, Attorney General, Gordon E. Allen,
Deputy Attorney General, and Kathrine S. Miller-Todd,
Assistant Attorney General, for appellee-State.

Larry F. Woods, Oelwein, guardian ad litem, for minor
children.

Heard by Sackett, P.J., and Habhab and Cady, JJ.

SACKETT, P.J.

Richard and Jodie¹, the father and mother of two children, Brandon, born February 18, 1988, and Jessica, born April 6, 1990, appeal from an order terminating their parental rights. The guardian ad litem for the two children also appeals. We affirm in part and reverse in part and remand.

Richard, born December 16, 1966, and Jodie, born April 15, 1971, were married in October 1988, eight months after the birth of their first child, Brandon, when Jodie was three months pregnant with their second child, Jessica. A relationship that had been difficult before marriage became more difficult afterwards. In April 1989, Richard and Jodie began receiving services, starting with a program for teenage parents. There is evidence the family had problems with abuse of alcohol, depression, and various personality disorders. After the second child's birth, a volunteer stayed with the family. There were marital conflicts. The parents had limited knowledge of raising children. The children were undernourished. Richard and Jodie had poor housekeeping skills. Richard and Jodie were under substantial financial stress and had a poor marital relationship. On July 26, 1991, the children were found to be children in need of assistance.

1. Jodie herself was placed in foster care when she was fifteen for protection because there were concerns she had suffered physical and sexual abuse from her stepfather.

On September 20, 1991, the children were removed from Richard and Jodie's care. Richard and Jodie and the children were living with Richard's parents in their farm home at the time of the removal. Problems between Richard and Jodie and problems they had with Richard's parents over the care of the children led to the removal. The removal was requested by Richard's parents. Parental rights were terminated December 27, 1993, and this appeal followed.

On appeal, Jodie contends the children can be returned to her custody and termination would be detrimental to the children because she has a close relationship with them. Richard contends he was denied reasonable services to reunite him with his children and the interests of the children would be best served by returning the children, at least on a trial basis, to the home of his parents where he lives. The guardian ad litem contends reasonable services were not offered Richard, the court should consider placement with Richard and the grandparents, and the court should not have terminated the parental rights of either parent.

The State contends the parental rights were properly terminated, the mother-child relationship was not so close that terminating it was detrimental to the children, and Richard was not denied reasonable services to be reunited with his children.

The guardian ad litem has played an important and active role in this case. He has recognized and assumed

his role as advocate for the children, not the parents or the state. See In re J.V., 464 N.W.2d 887, 893 (Iowa App. 1990). His appellate brief has been helpful. He had pointed out strengths in the State's case and the parents' case and weakness in the position of both. The substantial involvement of the guardian ad litem has been of benefit to this court. See In re A.H., 519 N.W.2d 425, 427 (Iowa App. 1994).

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, 105 S. Ct. 1212, 84 L. Ed. 2d 353 (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. Termination is a drastic, final step which improvidently employed can be fraught with danger. Accordingly, to preserve the best interests of both parents and children, termination must only occur where more harm is likely to befall the child by staying with his or her parents than by being permanently separated from them. Alsager v. District Court, 406 F. Supp. 10, 24 (S.D. Iowa 1975). The state's interest in protecting children must be balanced against the parents' countervailing interest in being able to raise their children in an environment free from government interference. Alsager, 406 F. Supp. at 22. Termination of

parental rights severs parental ties, but carries no promise of adoption.

We first address Jodie's claim the children can be returned to her. Following the removal, extensive services were offered to Jodie. Jodie has a series of problems, including a serious lack of credibility. The guardian ad litem advanced in his brief it was his opinion Jodie was the only witness at the termination hearing who was not credible.

There is evidence Jodie does not understand the physical and emotional needs of the children. Jodie claims to have been sexually abused by her stepfather, spent her late teen years in foster care, and had a serious problem with alcoholism. Jodie's mother contends Jodie was not credible about the sexual abuse report, and Jodie told her she lied about it.

In March 1992, Jodie was having sex with a young man, seventeen, who was a senior in high school and who she had met at a skating rink. There is also evidence Jodie has chosen other lovers in addition to the high school age boy who could put the children at risk. Jodie has minimally cooperated with service providers.

The guardian ad litem contends Jodie's parental rights should not be terminated, but he does not argue the children can be returned to her care. He points out, among other things, he found Jodie to be the major problem and determined she had never bonded with the children. We

agree with the juvenile court and the guardian ad litem that there is clear and convincing evidence the children cannot be returned to Jodie's care. We affirm the juvenile court's finding on this issue. We discuss the guardian ad litem's contention Jodie's parental rights should not be terminated later in this opinion.

We next address Richard's and the guardian ad litem's claim Richard was not offered reasonable services to resume care of his children. Following the children's removal, services were offered to Jodie.

The guardian ad litem advances there should have been efforts made to reunite the children with Richard, but no such efforts were made. The State's position reasonable efforts were made to assist the father is contradicted by the State's own records. The guardian ad litem directs us to the Department reports. One says, "If we raise the father's lack of cooperation as an issue, they will more likely focus on our lack of provision of services to the father." The second one says, "We can document that the father has had limited involvement and visitation since the children were placed in foster care. However, it does not appear that we have attempted to facilitate more frequent visits with the father."

We agree with Richard and the guardian ad litem that very minimal or no services were offered to Richard. See In re L.M.W., 518 N.W.2d 804, 807 (Iowa App. 1994). The issue of lack of services should have been raised by the

father at the time of the foster placement. See In re S.A., 502 N.W.2d 23, 25 (Iowa App. 1993). However, failure to raise lack of services before a termination hearing does not excuse the fact they were not offered. See In re A.L., 492 N.W.2d 198, 201 (Iowa App. 1992).

The real question is whether there is clear and convincing evidence the children cannot be returned to Richard's care. Richard lives with his parents. Richard and the guardian ad litem contend the children should go into this home at least on a trial basis. The guardian ad litem's argument points out what he perceived as a problem with the policies of the Department. He found the social worker from the Department assigned to the case did an excellent job but, to a certain extent, her work and testimony were offset by Department policy. He points out the worker was placed in a position where she was to try to work to reunify the family and, at the same time, prepare the best case she could for the state to terminate parental rights. He notes interoffice memos first talk about the children's visits with Jodie, note this as a concern for winning termination of parental rights, and then acknowledge there have been insufficient efforts by the Department to sustain the petition for terminating the parents' parental rights.

Richard has a good relationship with his parents and two sisters and two brothers. He found school difficult

and did not advance beyond ninth grade. He was unable to maintain a satisfactory relationship with Jodie.

The guardian ad litem takes issue with several of the juvenile court's findings. The court found Richard did not follow through with parenting classes. The guardian ad litem points out there is a certificate in the record that demonstrates Richard's completion of the classes. The guardian ad litem also disagrees with the juvenile court's finding Richard did not follow through with a substance abuse evaluation and counseling and notes tests by Dr. Harper did not indicate Richard had an alcohol or substance abuse problem, and yet the court terminated his parental rights for failing to obtain evaluation and treatment. We agree with the guardian ad litem's position on these issues.

The guardian ad litem questions the juvenile court finding the court is allowed to weigh the probable result of what would have happened if reasonable efforts had been advanced to reunite the children and Richard. The guardian ad litem expresses frustration that the case was decided on speculation.

After the children were found children in need of assistance, Jodie and Richard were allowed to keep the children if they moved in with Richard's parents, which Jodie and Richard did. Richard and Jodie continued to fight. There were difficulties between Jodie and Richard's parents concerning the care of the children. The State and

the guardian ad litem disagree on the reason the children were removed from Richard's parents' home. The State says the removal was because the Department wanted a less chaotic environment. The guardian ad litem advances the children were removed because Richard's parents were not financially able to care for Richard and Jodie and the children and Richard and Jodie made no contribution to finances or emotional support of the children and it was Richard's parents who requested removal. We agree with the guardian ad litem's assessment on this issue. Richard's parents have been willing to accept the children back into their home since they were removed.

Richard's parents have five children who are good citizens, most have some college education and good jobs. Richard's father is fifty-eight and Richard's mother is forty-eight. Both Richard's parents are currently in good health. While not wealthy, they have sufficient income with Richard's assistance to provide for the children financially.

The Iowa termination statute makes provision for other family members to provide permanent placement for children even if they cannot be returned to their parents' home. Iowa Code § 232.116(3). There is no showing these children will be adopted if parental rights are terminated.

Richard's parents are competent. The guardian ad litem did not find any physical limitations that would render them incompetent to care for the children.

Richard has a stable home life with his parents and there is not clear and convincing evidence the children would suffer harm if returned to the home he occupies with his parents. We reverse the order terminating Richard's parental rights.

The next question is should Jodie's parental rights be terminated. Richard does not request Jodie's parental rights be terminated. Jodie should be assisting with financial support for the children. The fact Richard's parental rights are not terminated does not preclude Jodie's parental rights from being terminated if there is clear and convincing evidence Jodie's continual presence in the children's lives create a serious disruption. See In re N.M., 491 N.W.2d 153, 156 (Iowa 1992). We find there is such evidence here that Jodie's presence has caused problems with the grandparents' custodial care in the past.

We follow the guardian ad litem's request and reverse and remand this case to the juvenile court to reinstate the father's parental rights. The juvenile court is directed to make further orders to place the children with Richard and his parents and order necessary services. We affirm the termination of Jodie's parental rights.

Costs are taxed one-half to the State and one-half to Jodie.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Habhab, J., concurs; Cady, J., dissents in part.

CADY, J. (dissenting in part)

I respectfully dissent from the decision by the majority to reinstate the father's parental rights. Our law permits termination of parental rights of a child in need of assistance who has been removed from the home for a statutorily defined period of time when clear and convincing evidence exists that the child cannot presently be "returned to the custody of the child's parents" as provided by the dispositional phase of the child in need of assistance proceeding. Iowa Code § 232.116 (1)(e), (f) (1993). The issue in this case is whether the two children in interest cannot be returned to the custody of one of their divorced parents because the definational grounds of a child in need of assistance still exist. See In re A.M.S., 419 N.W.2d 723, 725 (Iowa 1988).

The evidence to support termination of the mother's parental rights is painfully overwhelming. The difficult task is to consider the impact of the father's claim that the DHS failed to offer and facilitate reasonable services to enable him to resume the care of his children.

The DHS has an undeniable duty to make every reasonable effort to return a child to the child's home after obtaining custody in a child in need of assistance proceeding as soon as it is in the best interest of the

child. Iowa Code § 232.102 (7). The manner in which this duty is performed is a critical consideration in determining whether clear and convincing evidence exists that the child cannot be returned. If the department has not made reasonable efforts to assist the parents, it is difficult to conclude by clear and convincing evidence that the child cannot be returned. See In re A.L., 492 N.W.2d 198, 201 (Iowa App. 1992). The nature and extent of the efforts by the department, however, will necessarily vary with the particular circumstances of each case. In this case, I believe sufficient evidence exists that the children cannot presently be returned to Richard's custody.

It is important to recognize that the two children were removed from the parent's home in September 1991. They were not receiving adequate care and supervision. The relationship between the parents was quite strained, and their lives were chaotic at times. An initial placement in the home of Richard's parents proved unsuccessful, and the children were subsequently placed in foster care. A permanency plan was developed.

The parents separated for the final time in January 1992. Around the same time, Richard discontinued any meaningful contact with the children or the DHS. He visited the children twice in 1992, and failed to acknowledge them on their birthdays or Christmas. He visited the children twice in 1993 prior to the September review hearing. He did not attend the two review hearings

in 1992, and did not attend the review hearing in March 1993. The parents divorced in October 1992.

I acknowledge the parenting services offered by the DHS focused on the mother. In view of Richard's clear and prolonged failure to express minimal interest in the lives of his children, the departments' approach was understandable. The plans developed by the department, however, did not neglect Richard.¹ The March 1992 plan recommended Richard obtain psychological counseling, and the March 1992 review order directed Richard to obtain an out patient evaluation and follow any recommendations. Richard never obtained an evaluation or sought counseling.

The subsequent plans submitted by the DHS mentioned few services and responsibilities for Richard. Yet, if Richard was unable to understand and accept a fundamental parenting role like visitation, services to improve his ability to parent in other ways would be distant and removed. Richard was not acting as if he desired to be a part of the lives of the children. Moreover, his attorney never objected to the lack of services until late in the proceedings. An eleventh hour request for services comes too late. See In re B.K.K., 500 N.W.2d 54, 57 (Iowa 1993).

1. The majority finds the claim by the state that reasonable efforts were made to assist the father was contradicted by contrary acknowledgments in its own records. These records, however, actually consisted of an inter office memo summarizing the potential issues in the event the case proceeded to a termination hearing. I do not believe this constituted an acknowledgment.

Richard's mental disability is also a factor supporting termination. See In re T.O., 470 N.W.2d 8, 11 (Iowa 1991). Richard has an I.Q. of 68. His mental age compares to a twelve year old. He is unable to engage in abstract thinking. Expert testimony revealed Richard could only function as a secondary care giver. The claim that Richards' parents can assist Richard as the primary caretaker of the children, like the claim that the DHS failed to provide reasonable services, comes too late in the proceedings. The children should not wait any longer. I believe the statutory grounds for termination have been met and termination would be in the best interests of the children.