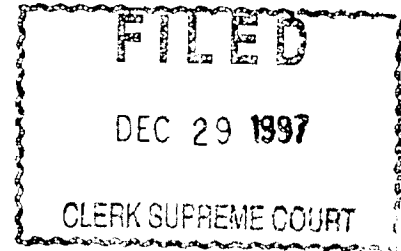


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IN THE COURT OF APPEALS OF IOWA

No. 7-498 / 96-1587
Filed December 29, 1997



IN THE INTEREST OF A.L.M.S., Minor Child,

T.A.P., Mother,
Appellant,

J.S., Father,
Appellant.

Appeal from the Iowa District Court for Johnson County, Sylvia A. Lewis,
District Associate Judge.

Mother and father appeal the termination of their parental rights.

AFFIRMED.

Alan R. Bohanan of the Peck Law Office, Iowa City, for appellant-mother.

Maurine A. Braddock, until withdrawal, and then Brian E. Heyer of Honohan,
Epley, Braddock & Brenneman, Iowa City, for appellant-father.

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

Amy L. Evenson of Larson, Mowry & Evenson, Iowa City, guardian ad litem
for minor child.

Considered by Sackett, P.J., and Streit and Vogel, JJ.

STREIT, J.

Tracy and John are the parents of Ashley, born July 1995. They appeal the decision of the juvenile court terminating their parental rights. We affirm the decision of the juvenile court.

Tracy sustained a head injury as a child. She is mentally retarded. She also has problems with mental illness; she has been diagnosed with bipolar affective disorder, post traumatic stress disorder, and borderline personality disorder. John also has some problems with mental illness, and has been hospitalized for depression.

Tracy and John lived together from November 1994 until February 1995, while John was separated from his wife, Kim. In February 1995, when John decided to reunite with Kim, Tracy attempted to commit suicide. After a brief hospitalization, she agreed to live at a residential treatment facility in Johnson County, where she has continued to live. This facility does not accept children.

Ashley had several health problems when she was born, and she is considered developmentally delayed. She remained in the hospital until August 18, 1995. There were many concerns about Tracy's ability to care for an infant. Ashley was placed in foster care when she left the hospital. Ashley was adjudicated a child in need of assistance on September 21, 1995.

Tracy participated in supervised visitation with Ashley. The visitation was supervised by a family therapist who provided Tracy with assistance in parenting

skills. Tracy was highly motivated to learn how to care for Ashley, but she was unable to retain the necessary information. The family therapists involved in the case believed Tracy had problems taking care of herself, and she could not take care of Ashley on her own.

During this period of time John was involved with the Department of Human Services (DHS) in Polk County in regard to his children with Kim. There are four founded reports against John for denial of critical care of these children, and two founded reports of physical abuse. In April 1996, John wrote to Tracy and asked to get back together. John had no contact with Ashley from the time she was born until July 1996.

On April 18, 1996, the State filed a petition to terminate the parental rights of Tracy and John to Ashley. On May 16, 1996, at a review hearing, Tracy proposed having her friend Patty live with her, and assist in caring for Ashley. Patty was then married and living in Polk County, although her husband had asked for a divorce. DHS did not fully investigate Tracy's proposal, in part due to difficulties in contacting Patty. Patty moved at about this time and signed a one-year lease in Polk County.

Evidence was presented at the termination hearing to show Tracy is not ready to live at a lower level of supervision, but she has the potential to do so in the future. Tracy will always need the support of counselors. Tracy has problems managing her anger. She needs constant supervision with Ashley.

Evidence was also presented at the termination hearing that Tracy had told a family therapist she was going to live with Patty until she was no longer under court supervision, and then she would live with John. Tracy testified she loved John, but wanted to live with Patty and raise Ashley. John testified he planned to move to Johnson County and marry Tracy. The parties' relationship is somewhat complicated by the fact Patty admitted she had a brief sexual relationship with John.

Patty testified she was willing to move to Johnson County and live with Tracy and Ashley. She testified she was a certified nursing assistance, and had experience as a licensed child care provider. She realized she was making a commitment for perhaps eighteen years or more.

The juvenile court concluded the plan of allowing Patty to care for Ashley was completely untenable. The court terminated Tracy's parental rights to Ashley pursuant to Iowa Code sections 232.116(1)(g) and (j). John's parental rights were terminated pursuant to sections 232.116(1)(b), (d), (g), and (j). Tracy and John have each appealed.

I. The scope of review in termination cases is de novo. *In re S.N.*, 500 N.W.2d 32, 34 (Iowa 1994). The grounds for termination must be proven by clear and convincing evidence. *In re R.K.K.*, 544 N.W.2d 274, 277 (Iowa App. 1995). Our primary concern is the best interests of the children. *In re A.B.*, 554 N.W.2d 291, 293 (Iowa App. 1996).

II. TRACY.

A. Tracy contends the State failed to show, by clear and convincing evidence, Ashley cannot be placed in her care, as required by section 232.116(1)(g)(4). She believes the State failed to prove Ashley would suffer harm if placed in her care.

All professionals in this case testified Tracy needed constant supervision to care for Ashley. Tracy herself admitted she would like somebody to be with her twenty-four hours a day to help take care of Ashley. We find there is clear and convincing evidence Ashley could not be placed in Tracy's care under the present circumstances.

B. Tracy also contends the juvenile court failed to consider her proposed alternative living arrangement. Tracy claims the juvenile court did not fully consider this alternative. She believes the court should have supported her proposal to live with Patty, who could then assist her in caring for Ashley. She asserts termination was not in Ashley's best interests because she could care for Ashley, with the help of Patty.

We believe the juvenile court did fully consider Tracy's proposed alternative living arrangement. We agree with the court's conclusion the proposal was untenable. We find Patty had not shown an adequate interest in caring for Ashley prior to the time of the termination hearing. There was also the problem of whether Tracy

actually intended to live with John in the future. In addition, there is the troubling relationship between Patty and John. For all of these reasons we affirm the juvenile court on this issue.

III. JOHN.

A. John claims the State failed to show Ashley could not be placed in his care, as required by section 232.116(1)(g)(4). He believes the State failed to prove Ashley would suffer harm if placed in his care.

We find there was clear and convincing evidence in the record to show Ashley could not be placed in John's care. John claims he did all he was asked to do by the Polk County DHS. Even if this were true, he did not even contact the Johnson County DHS to find out what he needed to do to establish a relationship with Ashley. John had no contact with Ashley from the week she was born until the week of the termination hearing. John admitted he physically abused his oldest child. We find John's parental rights were properly terminated under section 232.116(1)(g).

B. John contends that due to extenuating circumstances, the juvenile court should have exercised its discretion to continue the child in need of assistance proceedings instead of terminating his parental rights. He asserts the Johnson County DHS should have offered him services, such as transportation. He admits he did not seek services prior to the termination hearing. We conclude John has failed to

preserve error on this issue. Parents should demand additional or other services prior to the termination hearing. *In re B.K.K.*, 500 N.W.2d 54, 57 (Iowa 1993).

We affirm the juvenile court decision to terminate the parental rights of Tracy and John. We find this termination is in Ashley's best interests.

AFFIRMED.

Vogel, J., concurs; Sackett, P.J. partially dissents.

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SACKETT, J. (concurring in part; dissenting in part)

I concur in part and dissent in part. I do not share the majority's conclusion that termination is in Ashley's best interests. The sad commentary is we are unable to serve Ashley's best interests, which would be to have been born to two loving and caring parents able to meet her needs. We can only choose the least detrimental of available alternatives.

One alternative is to terminate Ashley's biological bloodlines, making her available for adoption with the hope a loving and caring adoptive parent or parents will soon take her and integrate her in a family. Yet, Ashley has special needs and, as are many other children whose parental rights are terminated, she may not be adopted, may wait a longer period for adoption, or may be institutionalized and raised by the State.

Our second alternative is to follow reasonable effort dictates and supply a structured and supervised environment where Tracy and Ashley can live together. Tracy loves her child and has been cooperative. Her problems are mental retardation and mental illness disabilities over which she has no control. Ashley was placed in foster care immediately after her release from the hospital following birth. Tracy was offered services, yet the services were not tailored to her abilities and she was not able to retain the necessary information. The family therapists who worked with Tracy are of the opinion she has problems taking care of herself and she cannot take care of Ashley without assistance.

Tracy offered a plan for live-in assistance to care for her child. I agree with the majority Tracy's proposal is not viable. Yet our inquiry should not end there. Our reasonable effort dictates require we make efforts to keep this family together either in an assisted living situation or a foster home. Tracy has never been offered this service.

Tracy loves her daughter. She is cooperative. There is no reason to believe Ashley will not have a better childhood remaining with her mother under these circumstances than she may in the State's care as a parentless child.

I also would not terminate John's parental rights. I recognize he has shown little or no interest in Ashley, and I do not believe he is entitled to additional services. He has an obligation to provide financial support for his daughter. Nothing convinces me we should relieve him of this obligation.