

FILED

FEB 26 1986

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

**IN THE INTEREST OF A.S.,
J.S., AND T.S., Minor Children**

**S.S., Natural Mother, and J.B.S.,
Natural Father,**

Appellants.

)
)
)
)
)

217

Filed February 26, 1986

5-675
85-868

Appeal from the Iowa District Court for Marshall County (Nos. 444, 445
& 446) - Sandra J. Holien, District Associate Judge.

The parents of three minor children appeal from an order terminating
their parental rights. **AFFIRMED.**

Beth H. Trout, of Brooks, Ward & Trout, Marshalltown, for appellants.

Thomas J. Miller, Attorney General, and Gordon E. Allen, Special Assistant
Attorney General, and Charles K. Phillips, Assistant Attorney General, and
Gail E. Boliver, Assistant County Attorney, for appellee.

Heard by Schlegel, P.J., and Hayden, and Sackett, JJ.

B.J.S. and S.S., the parents of three minor children, appeal contending there was insufficient evidence to reach the clear and convincing standard required for termination of parental rights.

Our review is de novo. We must determine if the state has shown by clear and convincing evidence the children cannot be returned to their mother's custody. See In Interest of C. and K., 322 N.W.2d 76, 77 (Iowa 1982).

S.S. and J.B.S. are the natural parents of A.S., a girl born in February 1979, T.S., a girl born in November 1980, and J.S., a boy born in October 1981. In March 1982 the three children were adjudicated children in need of assistance based on allegations of denial of critical care.

At this time, S.S. and J.B.S. were separated, and S.S. was the custodial parent. The three children were left in S.S.'s custody, and she was offered various services to help improve her parenting. In January 1983, the three children were taken from S.S.'s custody. In August 1983, the girls were returned to S.S., and the boy remained in foster care because of health problems.

S.S. and J.B.S. separated again in September of 1983. In October a placement report was filed indicating the home placement was successful. The father returned home. The children remained healthy and things went well.

In February of 1984, J.B.S. was arrested and charged with the murder and sexual assault of a woman. He was incarcerated. The day after J.B.S.'s arrest, S.S. requested the two girls be placed in foster care for a few days.

S.S. subsequently was charged with verbally assaultive behavior, spent a night in jail, attempted to commit suicide, and had mental treatment.

We agree with S.S. that she suffered a traumatic personal experience; the murder and sexual abuse charge against J.B.S. We understand and find no fault with her in returning the children to foster care following the murder.

We understand too why the tragic event caused S.S. to experience mental anguish and understand her need for redirection in her life.

However, at the time the petition for termination was filed the girls had been back in foster care for over a year. S.S. had had mental treatment. A raft of other services were available to her. However, the record clearly reflects S.S. was unable to attempt to help herself following the murder. After the placement, her hygiene became very bad. She established a series of relationships with various men. She left the state with different men on at least two occasions. Despite the fact she had no child care responsibilities, she did not obtain employment, and she seemed content to live in very substandard housing that was totally inadequate for the children when they visited. She missed scheduled appointments and staffings. She was evasive and untruthful with caseworkers. She has exhibited no real concern for the children.

We find no evidence from the time of the murder in February of 1984 until the termination petition was filed in April of 1985, of any effort by S.S. to attempt to correct her problems and make a positive effort to regain her children. We find clear and convincing proof she has substantially, continuously, and repeatedly refused or neglected to comply with the duties engendered by the parent-child relationship. We find clear and convincing evidence in the record to support a finding the children cannot be returned to their mother and that the children will suffer harm if returned to her. See In Interest of T.D.C., 336 N.W.2d 738, 744 (Iowa 1983).

The father contends in essence that he has been kept from his children by the criminal justice system. He was convicted of sexual abuse and murder in Marshall County and sentenced to two life sentences. He basically contends the criminal justice system has not yet run its course, and consequently, it is

unfair to terminate his parental rights when at some point he may conceivably be released and able to care for his children.

We determine there is little evidence of parenting by this man prior to the murder. In fact, the record reflects not only did he fail to take an active part in the parenting but he thwarted S.S. in some of her attempts to improve her parenting skills. We find, as did the trial court, J.B.S. has exhibited concern and interest for the children since his incarceration.

In In re Matter of Walker, 287 N.W.2d 642, 644 (Minn. 1979), despite the fact father testified he had changed his attitude and life-style since his incarceration for armed robbery, had become aware of the importance of the relationship between father and son, and had initiated efforts to establish a relationship with his son by correspondence, the Minnesota court considered the earlier parental neglect and terminated the parent-child relationship. Id.

In In Interest of Kester, 228 N.W.2d 107, 110 (Iowa 1975), the court discussed the fact they did not know how long the mother will remain in prison or whether she will rehabilitate her own life after she is released. Id. The Iowa court in affirming a termination of her parental rights said: "We do know she has refused by her past conduct over a period of five years to provide her children with necessary parental care and attention." Id.

We commend J.B.S. for his current interest in the children. We cannot, however, consider this fact in isolation but must weigh it with all factors to determine if the state has met its burden. We consider the fact that there is substantial evidence in the record of J.B.S.'s participation in a crime of murder and sexual abuse and he has been convicted of these crimes in district court. The fact of said participation alone weighs heavily against the children ever being returned to J.B.S.

While conceivably at some point in time J.B.S. could be released from incarceration, we determine even with the possibility of this fact there is clear and convincing evidence to support a finding the children cannot be returned to their father and will suffer harm if returned. We cannot gamble with these children's future. See In Interest of T.D.C., 336 N.W.2d 738, 744 (Iowa 1983).

AFFIRMED.