IN THE COURT OF APPEALS OF IOWA

No. 0-743 / 90-1465

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CLERK SUPREME COURT

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IN THE INTEREST OF N.M.H., A Child

T.R., Father,

Appellant,

S.R.H., Mother,

Appellant.

Appeal from the Iowa District Court for Woodbury County, Brian L. Michaelson, Juvenile Referee.

The parents of N.M.H. separately appeal the juvenile court order terminating their parental rights. Each parent challenges the sufficiency of the evidence to establish the child cannot be returned to his or her care. The father also contends that the termination of his rights, even if otherwise warranted, should be avoided because it might jeopardize the child's current placement with the father's relatives. **AFFIRMED.**

John S. Moeller of O'Brien, Galvin & Moeller, Sioux City, for appellant mother.

Robert J. Rehan, Sioux City, for appellant father.

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

Considered by Donielson, P.J., and Hayden and Sackett, JJ.

DONIELSON, P.J.

The child in question, N.M.H., is a girl born in July 1987. Her parents have never been married and have never cohabited; at the time of her birth, her mother, S.R.H., was seventeen years old and her father, T.R., was fifteen.

The child was in her mother's care for the first four months of her life. In November 1987, when the child was about four months old, she was placed in emergency foster care after her mother was found in an intoxicated condition due to sniffing paint. (As a result of this incident, the mother was charged with the crime of wanton neglect of a minor.) The child was adjudicated a child in need of assistance and has been in foster care continuously since that time. The child was initially placed with an unrelated foster family. Approximately three months later she was placed with her paternal grandmother. When the grandmother moved to Colorado in 1989, the child was placed with a paternal aunt. N.M.H. has remained in her aunt's home since that time. There was evidence the child has progressed well in her aunt's home and has bonded with her aunt.

In 1987 and 1988 S.R.H. made substantial progress in her attempt to have N.M.H. returned to her care: she completed an alcohol and drug program, she attended AA meetings and counseling sessions, and she attended a parenting and nurturing program. S.R.H. eventually received unlimited unsupervised visits with N.M.H. In

October 1988 she had an apartment and was seeking employment. The Department of Human Services (DHS) and the Florence Crittenton Home, a service provider, recommended that the child be returned to mother. On December 27, 1988, S.R.H. was given physical custody of her daughter.

In less than a month, the Florence Crittenton Home was reporting that because of S.R.H.'s irresponsibility and erratic behavior, N.M.H. was no longer safe with her mother. S.R.H. had stopped attending GED classes and AA meetings and had moved several times. She also resumed associating with persons using drugs and sniffing paint. She became unavailable for providing care to N.M.H. N.M.H. was returned to her paternal grandmother.

Between January and July 1989, S.R.H. again showed significant progress. She found an apartment and secured full-time employment. She acquired appropriate parenting skills. A July review hearing was continued and progressive visitation was granted. However, S.R.H. did not follow through with the plan for increased visitation. Since that time, S.R.H. has visited the child only sporadically. She has not maintained a stable residence or employment (DHS has listed 15 different residences for S.R.H. from November 1987 to June 1990). She has failed to keep appointments with service providers and has failed to apprise them of her current whereabouts. S.R.H. has not been consistent with her involvement with substance abuse aftercare, nor has she completed her GED.

T.R. has had no substantial contact with the child, even though the child has lived with his relatives for most of her life. He has an extensive criminal history in spite of his young age. Since N.M.H.'s birth, T.R. has been in placement at the State Training School for Boys (this being his third such placement since the age of twelve), a job corp program (he walked away within one week), a residential treatment facility with an independent living component (he left before completing the program), and in the custody of his mother in Colorado. T.R. is presently incarcerated as an adult on two charges of burglary in the second degree; he is serving a sentence of up to five years.

T.R. was in the same town as N.M.H. in January 1990 and did visit his daughter once or twice a week for forty-five minutes to an hour. He also contacted N.M.H. by phone. T.R. was not employed at that time, did not provide his social worker with his address, and provided no support for N.M.H. In February 1990, T.R. was arrested for breaking and entering. Since this arrest, T.R. has maintained consistent telephone contact with N.M.H., but there is no evidence of any bonding or attachment.

In May 1990, the State filed the present petition to terminate the parental rights of both parents. After a hearing, the juvenile court did terminate the parental rights of both parents. The juvenile court relied on Iowa Code section 232.116(1)(g) (Supp. 1989) which permits

termination if:

> (1) The child is three years of age or younger.
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> (2) The child has been adjudicated a child in need of assistance pursuant to section 232.96.
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> (3) The custody of the child has been transferred from the child's parents for placement pursuant to section 232.102 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.

Both parents, acting separately, appeal the termination order. Each parent challenges the sufficiency of the evidence to establish subsection 232.116(1)(g)(4); they contest the court's finding that the child cannot safely be returned to his or her care. The father also contends the termination of his rights, even if otherwise warranted, should be avoided because it might jeopardize the child's current placement with the father's relatives.

Scope of Review and Guiding Principles.

> Child in need of assistance actions are special proceedings requiring a de novo review. In re D.T., 435 N.W.2d 323, 329 (Iowa 1989). We review the facts as well as the law and adjudicate rights anew. We give weight to the fact findings of the juvenile court, especially when considering the credibility of witnesses, but we are not bound by them. In re A.M.S., 419 N.W.2d 723, 726 (Iowa 1988).
>
> On the question of termination of parental rights, the best interests of the child are our paramount concern. In deciding what is best for the child we look to the child's long-range as well as immediate interests. So we necessarily consider what the future holds for the child if returned to the parent. In making this decision we look to the parent's past performance because it may indicate the quality of care the parent is capable of providing in the future. Id.

> The State has the duty to see that every child within its border receives proper care and treatment. In re D.T., 435 N.W.2d at 329. To that end our statutory termination provisions are preventative as well as remedial. They are designed to prevent probable harm to the child and do not require delay until after harm has occurred. In re A.M.S., 419 N.W.2d at 726. 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. See Iowa Code § 232.1.

In re L.L., 459 N.W.2d 489, 493-94 (Iowa 1990).

S.R.H. Mother argues there exists insufficient evidence to support a finding that N.M.H. cannot be returned to her custody. She asserts: (1) at the time of the termination hearing, she had her substance abuse problem under control; (2) even though she has recently had only sporadic visitation with her child, has failed to find a permanent residence or employment, has failed to finish her GED, and is no longer bonded to her daughter, there is no reason N.M.H. could not be returned; and (3) N.M.H. has never been physically injured or otherwise harmed while in her mother's care.

We are unable to find reassurance in S.R.H.'s assertions. While we acknowledge that N.M.H. has not been physically injured while in her mother's care, we expect no less.

This court also acknowledges S.R.H.'s initial progress in seeking the return of her child. Unfortunately, that progress stalled. S.R.H. was given custody of her daughter in 1988. S.R.H. was so irresponsible that the child had to

be returned to the paternal grandmother within one month. In August 1989, mother again showed significant progress and increased visitation was attempted. Again, this attempt at reunification failed due to mother's irresponsible behavior.

N.M.H. is almost four years old and has been in the care of persons other than her parents for more than three of those four years. Our courts have been directed to consider the length of a child's alternative placement:

> It is unnecessary to take from the children's future any more than is demanded by statute. Stated otherwise, plans which extend the twelve-month period during which parents attempt to become adequate in parenting skills should be viewed with a sense of urgency. Of course some suggested extensions will prove to be appropriate. The judge considering them should however constantly bear in mind that, if the plan fails, all extended time must be subtracted from an already shortened life for the children in a better home.

In re A.C., 415 N.W.2d 609, 614 (Iowa 1987).

S.R.H. has been given numerous services and resources over the past three years. Yet she has failed to establish any sense of stability in her own life and there is no evidence she could meet this child's basic needs. When faced with the responsibility of the full-time care of N.M.H., S.R.H. regressed significantly and was unable to provide minimum care. N.M.H. need wait no longer for the maturity of her mother. See In re T.D.C., 336 N.W.2d 738, 744 (Iowa 1983). We affirm the juvenile court's termination of mother's rights.

T.R. Father argues there is no showing he has abused, abandoned, or neglected his daughter or that she would suffer were she placed in his custody. We take exception to T.R.'s contentions. While T.R. may not have abused N.M.H., he has consistently behaved in a manner that resulted in the restriction of his freedom and his absence from his daughter's life. Perhaps such behavior does not technically constitute "abandonment" or "neglect," see §§ 232.2(1) and (38), but it comes perilously close. See In re L.L., 459 N.W.2d at 495.

Additionally, section 232.116(1)(g)(4) requires clear and convincing evidence the child cannot be returned to the parent at the present time. Our de novo review of the record indicates this burden has been met. N.M.H. could not be placed in father's custody at the time of the termination hearing because of T.R.'s incarceration. There is no evidence T.R. is capable of caring for his daughter at this time or in the immediate future. Furthermore, T.R.'s past performance, i.e., his continuous criminal involvement and consequential incarcerations, provides insight into his possible future performance. T.R. has repeatedly engaged in irresponsible behavior resulting in his placement at correctional facilities. He has failed to take advantage of opportunities for his personal development. T.R. has consistently ignored the best interests of his daughter. Again, we must consider the length of N.M.H.'s placement in foster care. N.M.H. can

wait no longer for her father to assume his paternal responsibilities and obligations. We affirm the juvenile court's termination of father's parental rights.

The juvenile court also addressed the father's additional contention and concluded it was not in N.M.H.'s long-range best interests to remain with her aunt. First, while the court noted the placement had been good for N.M.H., the court recognized continued placement with the aunt would also mean continued sporadic involvement by mother and father in the child's life and "any termination of parental rights would be tantamount to an exercise in futility. . . " Second, the paternal aunt is unrelated to N.M.H. except through the aunt's marriage to T.R.'s brother. This man is also imprisoned and has been imprisoned throughout N.M.H.'s placement in her aunt's home. Once T.R.'s brother is released and returns to the home, it is unlikely the home could be approved either as a foster home or an adoptive home.

We find no reason to disagree with the juvenile court's rationale. Where we have concluded it is in the child's best interests to terminate parental rights, it becomes of paramount interest that the child be given every opportunity to be permanently placed. Like the juvenile court, we conclude it is in N.M.H.'s long-range best interests to be transferred from the aunt's home to the Iowa Department of Human Services for adoptive placement.

AFFIRMED.