

FILED

MAY 31 1988

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

**IN THE INTEREST OF
T.B. and J.B.,**

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Children,

Filed May 31, 1988

C.P., Mother,

Appellant,

T.B., Sr., Father,

Appellant.

8-97
87-1016

Appeal from the Iowa District Court for Black Hawk County (Juvenile),
(No. T-540), Stephen C. Clarke, Juvenile Referee, and Walter W. Rothschild,
District Associate Judge.

Both parents appeal the termination of their parental rights of their two
children. **AFFIRMED.**

John S. Pieters of Pieters & Pieters, Waterloo, for appellant mother.

W. H. Gilliam, Waterloo, for appellant father.

Thomas J. Miller, Attorney General; Charles K. Phillips, Assistant Attorney
General; and Molly Frazer and Janet Pederson, Assistant County Attorneys,
for appellee State.

Heard by Oxberger, C.J., and Donielson and Hayden, JJ.

DONIELSON, J.

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Both parents appeal the termination of their parental rights of their two children. We affirm.

The children in question are boys born in 1981 and 1982. They were adjudicated to be children in need of assistance in November 1984, and they have been in foster care continually since December 1984.

The children's father, T.B., has been incarcerated since before the 1984 CINA adjudication, and the children's mother, C.P., has been incarcerated since 1985. The father testified he had not engaged in criminal activity from 1977 to 1984. In 1984, he was arrested for burglary. While out on appeal bond, he was then arrested for armed robbery. He is now serving a twenty-five-year sentence and will not be eligible for parole until 1990. The mother's incarceration has been extended due to an escape and due to her inability to abide by institutional rules.

There was evidence that both parents have problems with substance abuse, that the father has physically abused the mother in the past, and that the mother neglected the children on a few occasions before her incarceration. On the other hand, there was evidence that the mother has met educational goals and benefited from counseling while in prison. There was also evidence that both parents have tried to maintain contact with the children while imprisoned.

In 1985 the juvenile court directed the State to file a petition seeking termination of the parental rights of both parents. The State did file such a petition, relying on the ground for termination stated in Iowa Code section 232.116(5). The juvenile court terminated the parental rights of both parents, and both parents have appealed.

I. We will first address those issues which the father raises in his appeal.

A. The father contends the termination was erroneous because the juvenile referee who ordered the termination had previously directed the State to file the termination petition. Specifically, the court order provided, inter alia, the following:

[T]he Court therefore concludes that protective and custodial orders requested should be followed. The Court further concludes that, in the event that the mother does not cooperate in her treatment and correction and obtain release from the correctional facility in three months, the department or the county attorney's office shall file a Petition for Termination of Parental Rights. The Court further concludes that, in the event after her release from the correctional facility the Respondent does not cooperate with the services of the department in returning her children to her, the department or the county attorney's office shall file a Petition for Termination of Parental Rights.

The father argues that a referee who has directed the filing of a termination petition should be recused from further involvement in the termination proceeding. The father relies on Canon 3 of the Iowa Code of Judicial Conduct which provides the judge shall not initiate communications concerning a pending matter.

We do not agree with the father's argument. Iowa Code section 232.102(6) (1985) provides in pertinent part the following:

The duration of any placement made after an order pursuant to this section shall be for an initial period of six months. At the expiration of that period and every six months thereafter, the court shall hold a hearing and review the placement in order to determine whether the child should be returned home, an extension of the placement should be made, or a termination of the parent-child relationship proceeding should be instituted.

In addition, Iowa Code section 232.111(2) states "[t]he . . . judge may authorize any competent person having knowledge of the circumstances to file a termination petition" The language in the above-quoted sections clearly gives the juvenile court the option of instituting termination proceedings.

Custody of children is to be fixed quickly. Long v. Long, 255 N.W.2d 140, 146 (Iowa 1977). The rationale is so that the harm caused to the children by delay in the system is minimized. See generally Interest of Dameron, 306 N.W.2d

743, 745 (Iowa 1981). We find there was no error in the juvenile court directing the initiation of a termination. Nor do we find there was error in the same judge presiding in the case to hear the merits. We agree with the State's position that the court was not prejudging the outcome by directing that a termination petition be filed but, rather, was merely determining that a termination decision needed to be made at that time. This rationale keeps in line with our principle that the children's best interests are our main focus. We have reviewed the referee's termination order and find it to have substantial support for its findings.

B. The father also contends the termination was erroneous because it was based on prior CINA proceedings for which the father had not been given adequate notice, appointed counsel, or an opportunity to be present.

The father states he did not receive notice of the November 8, 1984, adjudication hearing. We find otherwise. The order dated October 8, 1984, setting November 8, 1984, 9:30 a.m., as the time for hearing states that the Black Hawk County Sheriff was to serve the father, T.B., a copy of the order and original petition. This provision complies with rule 82 of the Iowa Rules of Civil Procedure as made applicable through Iowa Code section 232.37(4), which recites that service upon a party shall be made by delivering a copy to him at his last known address with service by mail completed upon mailing. Hearings under this area of law may be held without the presence of the parent if the parent fails to appear after reasonable notification. Iowa Code § 232.38(1). The father also alleges he was provided no notice of the disposition hearing set for December 27, 1984. Again, an order dated November 8, 1984, setting down the disposition hearing for 9:00 a.m., December 27, 1984, recited that the father was sent a copy in care of the Black Hawk County Jail. The father asserts there was no showing in the record that he was given notice of the June 28, 1985, hearing.

Once again, by order dated December 27, 1984, the court set down June 28, 1985, as the time for a review hearing with a notation that a copy of the order was to be sent to the father in care of the Oakdale facility. We find no merit in the father's assertions he was not given notice and an opportunity to be present with regard to the foregoing hearing dates. The record clearly indicates to the contrary. The father asserts he was not given notice of the January 17, 1986, hearing. On July 2, 1985, the juvenile court set down January 17, 1986, as the date for review hearing. The notation at the bottom of the order reflects that a copy was not served on the father. We note that a copy of the January 17, 1986, order was served on the father. Any complaints about lack of notice should have been raised then.

We next consider the father's claim that he was denied counsel in the CINA proceedings. Application for court-appointed counsel showing indigency was filed on December 21, 1984, by the father. No action was taken by the court.

Pursuant to Iowa Code section 232.89, indigent parents are entitled to be represented in CINA cases. The father, T.B., was not provided counsel.

With regard to this issue, the juvenile court set out the following:

The father herein was incarcerated either in jail, the Oakdale Reception Center, or prison at all stages of the CHINA proceeding. He was in no position to assume the physical care of the children. Further, in the letter of December 27, 1987, [sic] he did not contest the fact that the children were in need of assistance, and requested that their physical care be placed with his sister. The Referee complied with his request and placed the children with his sister.

Further, without detailing all of the evidence established at the CHINA hearing, the evidence was overwhelming that the children were properly adjudicated in need of assistance. Both parents were incarcerated, both had significant drug problems, and neither appeared motivated to learn or cooperate in developing parenting skills. The best interest of these children clearly under the circumstances required that they be declared children in need of assistance so that the State could assume the care which the parents failed to provide them. In Re Kester, 228 N.W.2d 107 (Iowa 1975).

Had the Court provided counsel to the father, as it should have been done under 232.89, it cannot under the record herein be stated with any degree of certainty that the result would have been otherwise.

We are in agreement with these findings.

C. The father contends the termination order was invalid because of alleged irregularities in the appointment of the presiding referee. He argues that the referee had not stood for election as required by Article V, sections 17 and 18 of the Iowa Constitution, nor was he appointed in accordance with Iowa Code sections 602.7101 and 602.7103. The father argues the referee's orders are void because the referee served for more than one year without standing for election.

The referee herein was appointed by a panel of juvenile court judges. Iowa Code section 602.7103 (1987) provides for a referee's appointment by a juvenile court judge. The tenure of a juvenile court referee lasts until removal for cause by a juvenile court judge. Iowa Code § 602.7103(1). The jurisdiction of the referee is the same as that of a juvenile court judge, except the referee shall not issue warrants. Iowa Code § 7103(2). Orders of a juvenile court referee may be reviewed by a juvenile court judge upon request of an aggrieved party within ten days. Iowa Code § 602.7103(3).

We are not persuaded that the referee lacked jurisdiction over this matter and therefore find the referee had the authority to enter the initial order terminating parental rights. The referee's order was further ratified by an associate district court judge, whose authority is not in question.

D. The father asserts termination of his parental rights was not supported by clear and convincing evidence. Termination of parental rights in this case was under Iowa Code section 232.116(5) (1985). Under that section, termination is warranted if the court finds (1) the children were adjudicated children in need of assistance; (2) custody of the children has been transferred from the

parents for placement for at least twelve of the last eighteen months; and (3) there is clear and convincing evidence that their custody cannot be returned to their parents as provided in section 232.102. The father argues that element (3) has not been proved. He contends there was no evidence that he abandoned the children or abused or neglected them in the past or would do so in the future.

Our review of the proceedings to terminate parent-child relationships is de novo. In the Interest of L.P., 370 N.W.2d 839, 840 (Iowa App. 1985); In the Interest of M.H., 367 N.W.2d 275, 278 (Iowa App. 1985). We accord weight to the fact findings of the juvenile court, especially when considering the credibility of the witnesses whom that court heard and observed firsthand, but we are not bound by them. Interest of L.P., 370 N.W.2d at 840; Interest of M.H., 367 N.W.2d at 278. Central to a determination of this nature are the best interests of the child. In Interest of Dameron, 306 N.W.2d 743, 745 (Iowa 1981). The State has the duty to see that every child receives minimally adequate care and treatment and will intercede when parents abdicate their responsibility. Id.; Interest of M.H., 367 N.W.2d at 278. The State may revoke the rights of parents if their allegations are proven by clear and convincing evidence. Iowa Code § 232.116(5)(c) (1985); Interest of Dameron, 306 N.W.2d at 745.

We initially note that not only may the court look at the past behavior of the parent, but that it is an important factor. Interest of M.H., 367 N.W.2d at 275. We look to the child's long-range and immediate interests and consider what the future could hold for the child if returned to the parent. Id. We may obtain insight for this determination from evidence of the parent's past performance, for that performance may be indicative of the quality of the future care that parent is capable of providing. Interest of Dameron, 306 N.W.2d at 745; Interest of M.H., 367 N.W.2d at 278. Insight may be gained from the parents' criminal record as to the assessment of parenting abilities. See generally In

re Interest of Griffin, 210 N.W.2d 665 (Iowa 1973) (parent's refusal to give up life of crime warrants termination of parental rights); In Interest of Kester, 228 N.W.2d 107 (Iowa 1975) (termination of parental rights of incarcerated parent).

Pursuant to the principles of law previously outlined, we find that a termination of T.B.'s parental rights is in order. The children have been in foster care since 1984. T.B. has demonstrated he lacks the ability to be an appropriate caretaker. He has repeatedly been incarcerated, has had numerous substance abuse problems, and has failed to learn and develop parenting skills. There is evidence in the record of his violent personality. The children involved do not appear to have a relationship with their father. The father has maintained minimal contact with them. A psychiatrist testified bonding to the father was "rather slim." We find that clear and convincing evidence has been demonstrated that the children cannot be returned to their father. T.B. is eligible for parole in 1990. However, the children cannot be allowed to suffer during the interim period where their future would be in limbo as to their placement. Nor do they need to wait endlessly for their father to attain the maturity and responsibility to care for them. In Interest of T.D.C., 336 N.W.2d 738, 744 (Iowa 1983). The father's record for recidivism is a factor we look to in making our decision. Thus, we find termination of T.B.'s parental rights is in order.

II. We now address the mother's claim involved in this appeal. She asserts one issue: was there clear and convincing evidence that the children could not be returned to her and that they would suffer harm if returned? The mother contends, despite her separation from the children, there is a bond between them. She points out the accomplishments she has made with her life and improvements involving her abilities. These advancements do not go unnoticed by us.

C.P. also has a criminal history. She has remained incarcerated longer than she originally needed due to her inability to obey institutional rules. She escaped from one facility. She has not successfully completed substance abuse or parenting programs. Initial placement of the children under foster care was due to the mother's leaving the two boys, then aged two and three, locked in a room while she would go drinking.

The mother has not convinced us that she has achieved the maturity and stability needed to return the children to her. She has demonstrated a consistent lack of cooperation with both the Department of Human Services and with the residential facilities in which she has been incarcerated. She has experienced repeated bouts with chemical dependency.

We agree with the juvenile court that the State has established by clear and convincing evidence that it is in the best interests of the children that the parental rights of both the mother and father be terminated. The children are in need of a nurturing, loving environment where stability will be provided in order that they may become productive adults.

AFFIRMED.