FILED
MAY 25 1993
CLERK SUPREME COURT

**IN THE COURT OF APPEALS OF IOWA**

No. 3-211 / 92-1553

**IN THE INTEREST OF B.M., J.M., and S.M., Minor Children,**

**R.M. and D.M., Natural Parents,**

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Appellants.

Appeal from the Iowa District Court for Louisa County, Thomas R. Brown, District Associate Judge.

The parents appeal a juvenile court judgment terminating their parental rights with respect to their children B.M., J.M., and S.M. **AFFIRMED IN PART; REVERSED IN PART AND REMANDED.**

Steven A. Sents of Newell & Sents Law Offices, Columbus Junction, for appellant-father.

Ronald D. Ellerhoff, Burlington, for appellant-mother.

Bonnie J. Campbell, Attorney General; John M. Parmeter, Special Assistant Attorney General; Judy Sheirbon and Charles K. Phillips, Assistant Attorneys General; and Timothy K. Wink, County Attorney, for appellee-State of Iowa.

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Peter W. Hansen, Burlington, for appellee-Guardian Ad Litem.

Heard by Oxberger, C.J., and Donielson, J., and McCartney, S.J.,* but decided by Oxberger, C.J., and Donielson, Schlegel, Hayden, Sackett, and Habhab, JJ.

*Senior judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

DONIELSON, J. 000373

R.M., the mother, and D.M., the father, appeal from a juvenile court judgment terminating their parental rights. R.M. and D.M. are the parents of three children: B.M., born in 1987; J.M., born in 1988; and S.M., born in 1980.

In June 1990, the State filed a child in need of assistance (CINA) petition after it was discovered the children were being inadequately supervised. That same month, the Department of Human Services (DHS) removed the children from the parental home. In July 1990, the juvenile court adjudicated the children to be children in need of assistance and placed the children in foster care. Neither parent contested the adjudication. The juvenile court ordered supervised visitation and ordered R.M. and D.M. to cooperate with DHS services and to obtain psychological and substance abuse evaluations.

In October 1990, the social worker discontinued R.M.'s supervised visits because R.M. had made only two of five weekly visits. In November 1990, D.M. was fired from his job at IBP for insubordination. In December 1990, D.M. was arrested for assault after becoming intoxicated and threatening R.M. outside a bar. While in custody, D.M. attempted suicide. He was then admitted to the Mental Health Institute in Mount Pleasant where he was committed to the chemical dependency unit for substance abuse for a period of thirty days. He was discharged in late January 1991 and began outpatient treatment.

In February 1991, a review hearing was held. The juvenile court continued foster care and ordered both parents to cooperate with DHS with regard to visitation. The court also ordered R.M. to obtain psychological and substance abuse evaluations and D.M. to follow his aftercare program and abstain from alcohol.

D.M. resumed visitation in February 1991, having not seen his children since November 1990. In April 1991, D.M. was discharged from outpatient treatment due to his repeated cancellations and a lack of compliance with the program. That same month, the marriage of R.M. and D.M. was dissolved. Also in April 1991, R.M. resumed visitation after a period of six months without contact. She continued visitation until July 1991.

In August 1991, another review hearing was held. At that hearing, R.M. and D.M. requested counsel and counsel was appointed for them. The court continued the foster care placement of the children. In September 1991, DHS prepared expectation sheets setting forth what was expected of R.M. and D.M. regarding visitation, obtaining evaluations, and cooperating with counseling. Both R.M. and D.M. signed the expectation sheets. In November 1991, R.M. was hospitalized after an overdose on aspirin.

In February 1992, D.M. sought outpatient counseling. A counseling report indicated D.M. had abstained from alcohol since November 1991. However, D.M. was declined services because D.M. had not expressed a desire to work

towards treatment goals and the counselors therefore believed the treatment would be unproductive.

In late February 1992, the State filed a termination of parental rights petition in conjunction with a DHS report. The report noted the children had made tremendous developmental strides in foster care. R.M. had never completed the court-ordered psychological or substance abuse evaluations. She had only sporadically visited the children and her last visit had been in July 1991. The report noted D.M. had attended visitations regularly since February 1991. However, the report found D.M. had not had permanent employment since being fired from his job in November 1990. D.M. had also failed to complete his alcohol treatment program, failed to regularly attend Alcoholics Anonymous, and failed to demonstrate he had an ability to take care of the children independently. The private agency which supervised visitation also filed a report which noted the children had been united in one foster home since February 1992 and recommended termination.

A hearing was held between May and July of 1992. In August 1992, the court issued its order terminating the parental rights of R.M. and D.M. pursuant to Iowa Code sections 232.116(1)(e) and (g) (1991).

Both D.M. and R.M. now appeal. They both argue there was insufficient evidence for terminating their parental rights under sections 232.116(1)(e) and (g). D.M. contends

the juvenile court improperly compared his parenting ability with that of the foster family. D.M. also claims the court should have refrained from terminating his parental rights pursuant to Iowa Code section 232.116(3)(c) (1992).

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 (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.

The primary concern in termination proceedings is the best interest of the child. Iowa R. App. P. 14(f)(15); In re Dameron, 306 N.W.2d 743, 745 (Iowa 1981).

> We look to the child's long-range, as well as immediate, interests. We consider what the future holds for the child if returned to his or her parents. Insight for this determination can be gained from evidence of the parent's past performance, for that performance may be indicative of the quality of the future care the parent is capable of providing. Our statutory termination provisions are preventative as well as remedial. They are designed to prevent probable harm to a child.

In re R.M., 431 N.W.2d 196, 199 (Iowa App. 1988) (citing Dameron, 306 N.W.2d at 745).

R.M. and D.M. both contend the State did not establish, by clear and convincing evidence, the elements of sections 232.116(1)(e) and (g).

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Iowa Code section 232.116(1)(e) (1991) permits the juvenile court to terminate the parent-child relationship if the court finds all of the following have occurred:

> (1) The child is four years of age or older.
> (2) The child has been adjudicated a child in need of assistance pursuant to section 232.96.
> (3) The custody of the child has been transferred from the child's parents for placement pursuant to section 232.102 for at least twelve of the last eighteen months, or for the last twelve consecutive months and any trial period at home has been less than thirty days.
> (4) There is clear and convincing evidence that at the present time the child cannot be returned to the custody of the child's parents as provided in section 232.102.

Iowa Code section 232.116(1)(g) (1991) permits termination if the court finds all of the following have occurred:

> (1) The child is three years of age or younger.
> (2) The child has been adjudicated a child in need of assistance pursuant to section 232.96.
> (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 at the present time the child cannot be returned to the custody of the child's parents as provided in section 232.102.

It is undisputed the children were previously adjudicated CINA following a finding of inadequate supervision. The children have been placed outside both parents' homes since the CINA adjudication in July 1990. Therefore, the issue on appeal relates only to sections 232.116(1)(e)(4) and (g)(4).

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The criteria for determining whether a child may be returned to the home is similar to the statutory criteria for determining whether a child should be removed from the home. In re M.W., 458 N.W.2d 847, 859 (Iowa 1990). Statutory criteria for determining whether a child shall be removed from the home include whether "the child cannot be protected from some harm which would justify the adjudication of the child as a child in need of assistance and an adequate placement is available." Id. (quoting Iowa Code § 232.201(4)(b)). If any of the grounds listed in Iowa Code section 232.2(6) (1991) can be established by clear and convincing evidence, there is a sufficient basis for the termination.

We first address whether there was sufficient evidence to support a termination of the mother's parental rights. In its order terminating R.M.'s parental rights, the juvenile court noted R.M.'s failure to comply with many of the recommendations set forth by the court and DHS. R.M. failed to complete the court-ordered treatment program for substance abuse. Furthermore, she had shown minimal interest in visiting the children in foster care.

R.M. contends she was unable to exercise visitation privileges with her children because she was not provided with adequate transportation. Since the time of the original CINA adjudication in June 1990, R.M. has moved from Louisa County, to Washington County, to Henry County, to Washington, and finally to Iowa City. She last told her

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social worker she next planned to move to the State of Colorado. The social worker testified R.M. would have been provided with transportation if she would have stayed in Louisa or Henry County. Nevertheless, R.M., knowing visitation would be fully accessible in Louisa or Henry County, chose to relocate numerous times. As a result, R.M. did not see her children between October 1990 and April 1991 (a period of six months), and between July 1991 and March 1992 (a period of eight months).

R.M. has failed to demonstrate any development of her parenting skills. R.M. continues to be emotionally and mentally unstable as she has been unable to maintain steady housing, employment, or transportation since the CINA adjudication in June 1990. These children should not be forced to endlessly await the maturity of their mother. In re T.D.C., 336 N.W.2d 738, 744 (Iowa 1983). Termination must occur if twelve to eighteen months have elapsed since the child was removed from the home and the parent still cannot take care of the child. Id. Evidence of the parent's past performance may be indicative of the quality of future care he or she is capable of providing. In re Dameron, 306 N.W.2d 743, 745 (Iowa 1981).

A great deal of patience and effort has been expended in the attempted reunification between R.M. and these three children since June 1990. However, R.M. has failed to ever demonstrate an ability to care for the children in a safe manner. We find there was clear and convincing evidence to

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support the termination of R.M.'s parental rights as to B.M., J.M., and S.M. under sections 232.116(1)(e) and (g).

We next address whether there was sufficient evidence to support the termination of the father's parental rights. On our review, we agree with the juvenile court's finding that "[i]t is easier to be more sympathetic with [D.M.]" but we disagree with the juvenile court's ultimate conclusion that there was nevertheless clear and convincing evidence to support the termination of his parental rights. Since the June 1990 original CINA adjudication, D.M. has demonstrated a concerted effort towards overcoming his substance abuse problem and reuniting with his children.

Many of D.M.'s difficulties which surrounded the June 1990 CINA adjudication stemmed from a serious substance abuse problem. The State criticizes D.M. for his failure to complete a structured alcoholic treatment program and his failure to regularly attend Alcoholics Anonymous meetings. We do not condone D.M.'s failure to fully address his substance abuse problem. However, the juvenile court conceded there was no showing D.M. was a current substance abuser. Furthermore, D.M. testified he has not consumed any alcoholic beverages since November 1991. D.M. has found support through an Alcoholics Anonymous sponsor who testified D.M. had been "trying" to effectively deal with his problem. We find D.M. has addressed his problem

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sufficiently to ensure his substance abuse problem will not threaten the children's well-being.

D.M. has shown a sincere and dedicated interest in parenting the children. Since February 1991, D.M. has missed only one visitation which occurred because D.M. became ill. D.M. requested overnight weekend visits, but they were denied because DHS stated it was unable to supervise such a visit.

The State contends the visitation which has occurred "does not bode well for [D.M.'s] caretaker skills." The State relies on several minor injuries which the children suffered while in his care. We find the injuries suffered by the children do not constitute evidence of neglect or of an inability to adequately supervise the children. One injury occurred as a result of one child touching hot glue on a chair which D.M. was repairing. The other injury involved a rabbit bite which occurred after D.M. told the children to stay away from the rabbit. D.M. testified as to his response following that injury which included cleansing the wound, testing the animal for disease, and informing the foster parents of the injury. Absent some pattern of neglect or of inadequate supervision, neither injury is indicative of anything more than the types of unfortunate accidents which often happen to young children.

D.M. is presently self-employed and is attempting to start his own repair business. He shares a house with a woman and would have the entire upstairs of the dwelling if

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the children were returned to his care. D.M. testified he would most likely rely, in part, upon government assistance programs in order to support the children. Such an arrangement admittedly is not ideal. However, a decision to terminate parental rights cannot be based on economic factors alone. In re Z.T.D., 478 N.W.2d 426, 428 (Iowa App. 1991) (citing In re R.M., 431 N.W.2d 196, 198 (Iowa App. 1988)).

Since February 1991, D.M. has been dedicated to working towards reuniting with his children. He has tried to address his substance abuse problem and has abstained from alcohol. He has shown an ability to cook healthy meals, keep the children clean, wash the children's clothes, and appropriately discipline the children. D.M. lives independently and is working towards becoming fully self-sufficient.

Noting D.M.'s progress and his willingness to cooperate with the services provided by DHS, we do not find the children would continue to meet the definitional criteria for child in need of assistance under Iowa Code section 232.2(6) (1991). We find the State has not established by clear and convincing evidence that the children cannot be returned to D.M. at the present time. We reverse on this issue and remand with directions to continue services and work towards full reunification between D.M. and the three children.

Because of our result, we will not address the other issues raised by D.M.

The costs of this appeal are taxed one-half to R.M. and one-half to the State.

For the reasons stated, we affirm the termination of R.M.'s parental rights. We reverse the termination of D.M.'s parental rights and remand with directions to the juvenile court.

**AFFIRMED IN PART; REVERSED IN PART AND REMANDED.**

All judges concur, except Sackett, J., who concurs in part and dissents in part.

**SACKETT**, J. (concurring in part and dissenting in part)

I concur in part and dissent in part.

I agree with the majority that these children who, at the ages of 6, 7 and 13, are probably not adoptable as a family unit are best served by assisting their father in assuming their care rather than terminating their parental rights.

Where I depart from the majority is where they terminate the mother's parental rights and her duty to support the children. If the father gains custody, he clearly will need child support from her.