FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-500 / 89-709

IN THE INTEREST OF J.B., A.W. & S.W., Children,

L.W., Natural Mother,

Appellant,

S.B., Natural Father,

Appellant.

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Appeal from the Iowa District Court for Johnson County, Jane F. Spande, District Associate Judge.

The mother of three children, and the father of two of them, have appealed from the juvenile court's order terminating their parental rights. They contend: (1) the evidence did not support termination, (2) they were denied substantive due process by a termination order based on insufficient evidence, (3) they were denied procedural due process because of omissions from the termination petition, and (4) the State did not fulfill its constitutional and statutory mandate to make reasonable efforts to reunite the family before seeking termination. **AFFIRMED.**

Mary K. Hoefer of Mears, Zimmerman & Mears, Iowa City, for the appellant mother.

Mary A. Weideman of Weideman & Dilkes, Iowa City, for the appellant father.

Thomas J. Miller, Attorney General; Gordon E. Allen Deputy Attorney General; Kathrine S. Miller-Todd, Assistant Attorney General; and Tammy Roush, Assistant County Attorney, for the appellee State.

James C. Larew, of Hayek, Hayek, Hayek & Holland, Iowa City, guardian ad litem for the children (appellee).

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

DONIELSON, J.

This case involves three children: boys born in December 1981 and July 1983, and a girl born in August 1984. All three children have the same mother (L.W.); the younger two children have the same father (S.B.), while the oldest child has a different father (M.M.). Neither father has ever been married to the mother. The oldest child's putative father has never had any contact with his child and has denied paternity. The father of the two younger children had little involvement with his children from 1984 to 1987, but in the latter year he began to exercise visitation. He now expresses an interest in obtaining custody of all three children.

The children lived with their mother until November 1986. They were adjudicated children in need of assistance in October 1986, and were placed in the home of the mother's sister on November 14, 1986. In May 1987 they were transferred from the sister's home to foster care, where they have since remained.

In November 1988 the State filed a petition to terminate the parental rights of the mother and both fathers with respect to all three children. After a hearing, the juvenile court terminated the parental rights of the mother and both fathers. With respect to the father of the oldest child, the juvenile court relied on the ground of abandonment. With respect to the mother and the father of the two younger children, the juvenile court

relied on the basis for termination stated in Iowa Code section 232.116(1)(e).

The mother and the father of the two younger children have filed separate appeals from the termination order. The father of the oldest child has not appealed. From this point on, all references to "father" in this opinion are to appellant S.B. unless otherwise indicated.

The mother challenges the sufficiency of the evidence to establish the children cannot be returned to her custody. She also contends she was denied substantive due process by the termination of her parental rights on allegedly inadequate evidence.

The father of the two younger children also challenges the sufficiency of the evidence to establish the children cannot be placed in his custody. Likewise, he contends he was denied substantive due process by the termination of his parental rights on allegedly inadequate evidence.

In addition, both appellants raise two other issues. They contend they were denied procedural due process because the termination petition did not adequately state how they had failed as parents, or what harm would befall the children if returned to their custody and care. In addition, they contend the State did not adequately fulfill its constitutional and statutory mandate to make reasonable efforts to reunite the family before seeking termination.

A review of the background of each party is necessitated before this court can address the relative

merits of their claims. The record in this case is voluminous. To simplify matters, we will examine the pertinent background facts of the mother, and then the father. Following that, we will review the circumstances leading to the CHINA adjudication and eventual foster care placement of the children.

Mother's Background. L.W. was born in 1962. She was the third oldest child in a family of seven children. Her home life was marked by physical and sexual abuse. Her abusive father raped her when she was thirteen. The record reveals her sisters were also subjected to their father's sexual advances. Her father and a brother were each incarcerated for sexual crimes. L.W. ran away from home numerous times. She completed only a ninth-grade level of education.

From October 1980 to October 1981 L.W. lived with M.M. He abandoned her when he learned she was pregnant. M.M. has had no contact with his son, S.W., and in fact denies he is his father. L.W. lived with S.B. from March 9, 1982, to May 9, 1984. They had a son, J.B. in July 1983, and S.B. left L.W. three months before the birth of their second child, A.W. S.B. subjected L.W. to brutal violence throughout their relationship. He pushed her through a bedroom window when she was pregnant with J.B., and he subjected her to beatings when she was pregnant with A.W.

After S.B. left L.W., she led a somewhat nomadic, reckless, and irresponsible existence. She moved

frequently and engaged in substance abuse. Her inability to control her consumption of alcohol led to an inability to pay her bills, and at one point, she lost her trailer and was forced to live out of her car. L.W.'s children stayed with her sister (B.I.) at that time. At one point, family members attempted to have her involuntarily committed so she could obtain treatment for her substance abuse.

L.W. had a history of placing her children in the care of others for weeks and, at times, months on end. She often failed to leave sufficient provisions (i.e., money, food stamps, and the children's medical cards) with their caretakers. She even left her children in the care of her parents, despite her knowledge of her father's past physical and sexual abuse of his own children.

The last steady employment engaged in by L.W. was in 1980, when she worked at a Veterans Administration Hospital as a cook/cashier. The record reveals she worked with a traveling carnival in the summer of 1987.

L.W. was arrested for fourth-degree theft in 1984. Numerous probation violations (i.e., leaving the county and state without permission, failure to attend AA meetings, and engaging in criminal conduct) resulted in a thirty-day jail term. L.W. was charged with assault on July 2, 1985, and with fifth-degree theft on October 10, 1986. She was arrested on October 13, 1986, for driving while her license was under suspension. On December 3, 1988, she was charged with criminal mischief.

Father's Background. S.B. dropped out of school when he was fourteen. When he and L.W. began to live together in 1982, he was already the father of seven children: twins with a Scott County woman, a son with an Iowa City woman, and four children with G.B. With regard to the twins and the son, S.B. has had no relationship with those children, and he has provided no support for them. S.B. and G.B. entered into a common-law marriage in 1971. They were divorced in 1979. They had four children, three daughters and a son. They remarried in 1984 after he ended his relationship with L.W. Their current household consists of their four children and C.C., G.B.'s child from another marriage.

The children of S.B. and G.B. have numerous problems and special needs. One has a serious learning disability; another is in special remedial classes at school; and deafness in one ear handicaps a third child. A fourth child, their son, has a history of emotional problems and uncontrolled behavior. He has been the subject of out-of-home placement.

S.B. has a history of alcohol abuse and physical violence. He claims neither is a problem now. S.B. was imprisoned from 1975 to 1977 for receiving stolen property and for being an accessory to arson. He was imprisoned again in 1978 for involuntary manslaughter, the result of driving while intoxicated. At present, he and his wife appear to have no steady means of employment.

CHINA. On June 13, 1986, at approximately 10:00 p.m., police stopped an adult male who was walking along a busy highway with S.W. and J.B., then four-and-a-half and three years of age. The children were barefoot and filthy dirty. They reported they had had nothing to eat all day. A check on the adult revealed a felony arrest warrant had been issued for him in another state.

L.W. had left her two sons in the care of this man who she had known only four days and whose last name she did not know. She was out of town that weekend working with a carnival. A CHINA petition was filed on June 23, 1986. The children were returned to the custody of their mother pending the CHINA hearing and subject to the protective supervision of the Department of Human Services (DHS).

DHS purchased a variety of social services aimed at altering L.W.'s past patterns of neglect and poor parenting. Families, Inc. was to provide counseling to help L.W. improve her parenting techniques and to improve her decision-making with regard to the children's needs. DHS provided protective day care and transportation for taking the children to the Head Start program. A homemaker-health aide was assigned to assist L.W. in keeping a cleaner home.

Between the time of the emergency removal hearing (June 30, 1986) and the dispositional hearing (November 14, 1986), L.W. proved quite irresponsible in keeping scheduled appointments with Families, Inc. and the homemakers

agency. She showed no commitment to providing a more stable or structured life-style for her children.

On October 3, 1986, L.W. stipulated to a CHINA adjudication pursuant to section 232.(6)(c)(2). L.W.'s attorney explained to the court that L.W. was agreeing to the adjudication so she and her children could receive services which they needed very much. L.W. pledged to cooperate with DHS in its attempts to help her and her children. Seven days later, L.W. was charged with fifth-degree theft, and three days after that, she was arrested for driving while her license was suspended. In the weeks following her arrest, L.W. continued to miss scheduled appointments with her probation officer and with DHS service providers.

At the November 14, 1986, dispositional hearing, L.W. agreed to placement of her children with her sister (B.I.) and her brother-in-law (L.I.). L.W. indicated this out-of-home placement would allow her the opportunity to complete a jail-time obligation and to get some job training which would enable her to support her children.

The children lived with their aunt and uncle until May 1987. At that time the aunt and uncle's home was the scene of an assault, two suicide attempts, and domestic violence. L.W. then agreed to foster home placement of her three children. They have remained in foster care since May 15, 1987.

Standard of Review. Appellate review of termination proceedings is de novo. In re W.G., 349 N.W.2d 487, 491 (Iowa 1984), cert. denied, 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. Children should not be forced to endlessly await the maturity of their parents. In Interest of 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 a parent's past performance may be indicative of the quality of future care he or she is capable of providing. In the Interest of Dameron, 306 N.W.2d 743, 745 (Iowa 1981).

Iowa Code section 232.116(1)(e) (1989) permits the juvenile court to terminate the parent-child relationship if the child has been adjudicated in need of assistance, has been placed out of the parent's custody for more than twelve of the last eighteen months, and there is clear and convincing evidence the child will suffer harm specified in Iowa Code section 232.2(6) (1989) if returned to the parent. See In re K.L.C., 372 N.W.2d 223, 227 (Iowa 1985).

Sufficiency of the Evidence. Both the mother and father claim the evidence was insufficient to terminate their parental rights. We will address first the claim of the mother and then the father.

L.W. has demonstrated irresponsibility, poor judgment, and a lack of commitment to regaining custody of her children. She had a deplorable record with regard to visitation with her children. She did not attempt to use all of the scheduled visits which were allotted to her, nor did she keep the visits which she did schedule.

L.W. displayed a similar lack of commitment to adhering to the recommendations made by DHS. She chose not to deal with her substance abuse problem, and she refused to receive counseling which would address her own history as a victim of physical and sexual abuse.

L.W. continued her history of frequent moves. She did not obtain shelter suitable for return of her children, and in fact the record reveals she traveled with a carnival from June to October 1987.

L.W. has demonstrated a disturbing history of very poor judgment. This poor judgment is typified by her decision to work for a carnival in 1987. Undertaking employment of this nature not only undercut L.W.'s opportunities to obtain employment and housing near her children, but it virtually ensured she could not continue to have visitation with them during that time.

L.W.'s past choice of caretakers for her children also reveals an inability to provide for her children's care and safety. She often left her children with others for extended periods, yet she failed to leave the necessary provisions the children would need during her absence. The

incident which triggered the CHINA adjudication in this matter, leaving her children with a man she had only briefly met, illustrates the utterly incautious attitude she had towards her children's care.

The most frightening aspect of L.W.'s irresponsible nature is her denial of obvious risks and harms which could threaten her children's safety. She expresses no concern about leaving her children with her parents, despite the violence and sexual abuse which permeated their household when she was growing up. At first L.W. denied the existence of any abuse (physical or sexual) in her family, and she characterized them as "one big happy family." Her testimony reveals an adamant level of denial with regard to whether her father could ever harm her children. At one point, L.W. told a DHS social worker she felt DHS was making her choose between her kids and her father, and she would not do that. L.W.'s failure to secure counseling and work through the effects of her own personal abuse manifests itself in denial and in subjection of her children to similar risks. The record is replete with a number of disturbing incidents in which her young children have engaged in overt sexual behaviors or sexual "acting-out." This learned behavior reveals these children have already been subjected to hearing language and observing behavior not appropriate for small children. It seems unlikely L.W. would be able to recognize high-risk situations and protect her children from potential abuse.

A final example of L.W.'s poor judgment is her inability to see any connection between her ability to parent and her drinking. Both her parole officer and DHS had recommended L.W. abstain from drinking and attend regular substance abuse meetings. L.W. continually resisted attempts to encourage her to attend MECCA or AA meetings.

There is simply no question her children will be likely to suffer harm if returned to L.W.'s care. As one of the family therapists involved in this case aptly noted in a quarterly report, "[L.W.'s] childhood [was] one of abuse and neglect. She did not grow up in a stable and nurturing environment that would be likely to produce good feelings about herself. She does not know of the kind of environment she is being asked to create for her children." L.W.'s situation reflects the sad truth that abuse and neglect beget abuse and neglect. However, despite the fact that L.W. was not raised in a safe or stable home and could not know first-hand what type of positive and structured home life children need and deserve, she was offered numerous services to assist her in managing her home and in developing parenting skills. She resisted these services and has only herself to blame for her noncompliance. Clear and convincing evidence warranted termination of L.W.'s parental rights.

The father also contends there was not sufficient evidence to terminate his parental rights. S.B. had no

contact with the children from the time he left their mother in May 1984 until June 1987. At that time, he stipulated to the transfer of custody of the children to DHS, but he requested the preparation of a home study and case permanency plan with the hope the children could eventually be returned to him. After approval of the case permanency plan in September 1987, S.B. and his current family (wife G.B. and their daughters) began visitation with the children. When S.B. became frustrated with the amount of time it was taking to facilitate a reunification with his children, he decreased and ultimately ceased the DHS supervised visits with the children. He began to decrease his visitation in the spring of 1988, and at one point he began to discuss voluntary termination of his parental rights. Despite a court order to do so, S.B. refused to participate in a Child Development Clinic (CDC) evaluation in September 1988.

S.B. did not demonstrate any commitment to support his children between 1984 and 1987, and his renewed interest in 1987 waned at about nine months into implementation of the case permanency plan. S.B.'s refusal to participate in the CDC evaluation exemplifies his lack of any genuine commitment to obtaining custody of the children. The CDC evaluation was ordered in response to S.B.'s request for additional unsupervised visits. It was understandable that the trial court had concerns about S.B.'s ability to parent, in light of his history of violence, criminal

activity, and substance abuse. DHS involvement regarding some of S.B.'s other children would also raise concern for a court determining placement of a child. The CDC evaluation offered an opportunity to obtain a comprehensive examination of S.B. and his family. Such an examination would provide information not garnered in the home study or in the evaluation prepared by Dr. Marchman.

S.B.'s conduct in this matter reveals a lack of commitment to obtaining custody of his children. It is unlikely S.B. and his wife, who already have a household of children with special needs and problems, would be able to effectively parent three young children whose emotional needs are such that even experienced "therapeutic" foster homes have had difficulty in caring for them. In any case, S.B. withdrew himself from serious consideration for placement of the children when he cut off visitation and refused further compliance with the court-ordered CDC evaluation. Clear and convincing evidence supports termination of his parental rights.

Substantive Due Process. The mother and father each claim termination of their parental rights violated their substantive due process rights. The right to raise one's children is an essential, basic civil right, a right far more precious than property rights. In Interest of M.H., 367 N.W.2d 275, 278 (Iowa App. 1985). Parents "possess a fundamental 'liberty' and 'privacy' interest in maintaining the integrity of the family unit." Alsager v. District

Court of Polk County, 406 F. Supp. 10, 16 (S.D. Iowa 1975), aff'd 545 F.2d 1137 (8th Cir. 1976). State interference with this right can only be justified by a compelling state interest. Id. at 21-22.

The mother argues the State had no compelling interest to terminate her parental rights because there was no showing that her unwillingness to attend counseling sessions, and her lack of income, would cause imminent harm to her children. She oversimplifies the basis for the trial court's termination of her parental rights. The evidence consisted of clear and convincing evidence which demonstrated: she lacked any kind of commitment to comply with the DHS recommendations set forth in her case permanency plan; she failed to visit her children on a regular basis; and she refused to partake of personal counseling sessions. Each of these objectives was intended to improve L.W.'s parenting and homemaking skills. She showed an alarming lack of good judgment on numerous occasions, and this poor judgment, if repeated, could endanger her children's physical and emotional safety. Her unwillingness to attend counseling sessions (intended to improve her parenting skills and judgment) increased the possibility her children would be subjected to unnecessary risks and imminent harm.

Her lack of income was not a basis for terminating her parental rights. Day care and transportation were made available by DHS to allow her to participate in the

recommended group and individual counseling sessions. It was her failure to attend these sessions and use them to modify her parenting skills which resulted in termination of her parental rights. Her lack of commitment, not a lack of income, caused her to lose her children. Her substantive due process rights were not violated.

The father claims his right to substantive due process was violated because there is no evidence his failure to participate in the CDC evaluation was the kind of behavior which would cause imminent harm to his children. His rights were terminated because he failed to follow through and demonstrate a genuine commitment to getting custody of his children.

S.B. had not been a part of these children's lives for three years. He had a history of violent physical abuse toward his wife and L.W. He had a criminal record and had suffered from substance abuse. DHS had been involved with his current family regarding allegations of child abuse. It is without question DHS had an obligation to fully investigate S.B. and his current family's status before they could recommend placement of the children with him. When S.B. became frustrated with the amount of time it was taking to get custody of his children, his new-found interest in these children diminished. He decreased his visits and refused to cooperate with DHS by participating in the CDC evaluation. Such behavior indicates he lacked a sincere commitment to gaining custody of these children.

His absence from the CDC evaluation, and similarly from the termination hearing, sends a clear message as to the lack of commitment he had in this matter, and it legitimized every fear DHS and the trial court had as to his ability to administer to the needs of his children. His substantial due process rights were not violated in this case.

Procedural Due Process. Each parent claims they were denied procedural due process. They claim the termination petitions did not specify what type of harm would befall the children if returned to their parents and in what manner they could be children in need of assistance if returned to their parents' custody. The court seriously doubts the sincerity of these arguments in light of the extensive record compiled in this matter. In any case, neither parent raised a due process claim before the trial court and they cannot now do so on appeal. In Interest of Robbins, 230 N.W.2d 489, 494 (Iowa 1975) (issue raised for first time on appeal is raised too late). Similarly, the father's claims of due process violations premised on the failure of his permanency case plan to "provide meaningful guidelines," and his claim with regard to the scheduling of the CDC evaluation, should have been raised before the trial court.

Reasonable Efforts. Finally, the mother and father claim the State did not meet its obligation to use "reasonable efforts" to return the children to their parents' homes. The record discloses the many and laudable

efforts taken by the State to facilitate the return of these children to their parents. The State can provide any number of services intended to encourage an individual to become a better and more effective parent; however, the State cannot force someone to utilize those services. L.W.'s lack of "reasonable effort" in this case is the explanation for termination of her parental rights.[1]

S.B. complains that the State erected an "unreasonable" barrier to placement of the children in his home with regard to requiring the CDC evaluation. We cannot condemn the State for seeking a comprehensive evaluation of S.B. and his current household. Participating in the CDC evaluation was reasonably required by the State in this case. The claim that the State failed to use reasonable efforts to reunite these children with their parents is without merit.

AFFIRMED.

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1. To the extent L.W. alleges the State should have exerted more effort to help her attain adequate housing, we note the testimony of social worker Judy Ellyson, which indicates L.W. did not even bother to provide the verification necessary to ensure her active status on a leased housing list.