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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-416 / 89-762

96

In the Interest of J.W.D.,

A Child,

A.D., Mother,

Appellant.

Appeal from the Iowa District (Juvenile) Court for Marshall County, Victor G. Lathrop, Juvenile Referee.

The mother of a child appeals from the termination of her parental rights. **REVERSED.**

Beth H. Trout of Brooks, Ward & Trout, Marshalltown, for appellant mother.

Thomas J. Miller, Attorney General; Gordon E. Allen, Deputy Attorney General; and Judy Sheirbon, Assistant Attorney General; for appellee State.

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

HAYDEN, J.

This is a mother's appeal from the termination of her parental rights regarding her son, J.W.D. He was born on September 8, 1985, to A.D., who was then 16 years old.

In January 1986 he was adjudicated a child in need of assistance because his parents failed to exercise a minimal degree of care in supplying him with adequate food, clothing or shelter, and refused other means available to provide such essentials. In late summer 1986, A.D. voluntarily transferred custody to the Iowa Department of Human Services (Department) for foster care placement. J.W.D. has remained in the same foster home since that time.

After a hearing initiated by the State, the trial court ordered termination of the rights of both parents. A.D. now appeals. She raises the following issues for our consideration: 1) the trial court did not properly balance the competing rights of the child, rights of the parent, and duties of the State in the termination order; 2) the trial court gave undue weight to evidence the mother was borderline mentally retarded and her son suffered from emotional and behavioral problems; 3) the evidence regarding her ability to meet the needs of her child and to properly supervise him did not meet the clear and convincing standard required for termination of parental rights. We agree and reverse.

When J.W.D. was born, A.D. was living with her husband, who was 28 years old. She was in special education classes in high school. The parents separated and A.D. moved in with her mother for a short while. When J.W.D. was nine months old, she moved into her own apartment. Public health nurses and a social worker were involved because A.D. was not adequately caring for her baby. In July 1986, she voluntarily placed J.W.D. with the Department and entered the hospital for evaluation and psychiatric treatment. She has been diagnosed as borderline intellectual functioning with an adjustment disorder.

On April 1, 1987, she enrolled in the Job Corps in Denison, Iowa. The case plan developed by A.D.'s social worker provided she was to stay at the Job Corps for at least six months to learn to be self-sufficient and to save as much of her earned income as possible. She remained in Denison in the Job Corps until May 1988.

Although she began nurses' aide training, when it proved too difficult she switched to the baking program. A.D. completed the baking program, drivers' education, and the leadership training program. Although she began culinary arts, she did not complete that training program.

After graduation from the Job Corps in May, A.D. had a difficult time settling down. She lived in Nevada for a month with a couple who took most of her savings for three months' rent, then kicked her out of the apartment

after the first month. A.D. walked the almost-thirty miles from Nevada to her home town. She lived in several different places with several different roommates. Although she began work at a sheltered workshop, she was terminated when she didn't report for work on eleven of the thirty-five days she was employed. She was suffering from morning sickness because of her second pregnancy, but didn't tell anyone at the workshop. In January of 1989 she moved into an apartment which she rents from her aunt, who lives below. The aunt has daily contact with A.D. and helps her with her finances and occasional guidance in housekeeping.

J.W.D. was doing well in his foster home until May 1988, when his foster mother reported he was behaving aggressively. In June 1988, he was evaluated by an Area Education Agency (A.E.A.) 6 team. He was diagnosed as low average intellectual functioning with mild oppositional disorder. The team recommended, and J.W.D. began attending, a preschool for handicapped children. His foster parents entered counseling to learn parenting skills to deal with his inappropriate behavior. J.W.D.'s teacher reports his behavior has improved.

The State alleges the parent-child relationship between J.W.D. and his mother should be terminated pursuant to Iowa Code section 232.116(1)(e). This requires the State to show, by clear and convincing evidence:

1. the child has been adjudicated a child in need of assistance pursuant to section 232.96;
2. the custody of the child has been transferred from the child's parents for placement pursuant to section 232.102 for at least 12 of the last 18 months;
3. there is clear and convincing evidence that the child cannot be returned to the custody of the child's parents as provided in 232.102.

The only contested issue is whether the State has shown, by clear and convincing evidence, that if J.W.D. is returned to his mother's custody, he cannot be protected from harm which would classify him as a child in need of assistance.

Our review of such actions is de novo. Iowa R. App. P. 4. We give weight to the findings of the juvenile court, but are not bound by them. Iowa R. App. P. 14(f)(7). Our primary concern must always be the best interests of the child. In the Interest of Chad, 318 N.W.2d 213, 216 (Iowa 1982). However, we must also consider a parent's right to raise one's children, which is an essential, basic civil right "far more precious than property rights." In the Interest of M.H., 367 N.W.2d 275, 278 (Iowa App. 1985), citing to Stanley v. Illinois, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212, 31 L. Ed. 2d 551, 558 (1972). A court must walk into a termination proceeding cloaked in the presumption the best interests of the child will be served by leaving it with its parents. In the Interest of M.H., 367 N.W.2d at 278, citing to In

Interest of T.D.C., 336 N.W.2d 738, 740 (Iowa 1983). The State's duty is to see that every child receives minimally adequate care and treatment and to intercede when parents abdicate their responsibility. In the Interest of M.H., 367 N.W.2d at 278, citing to In Interest of Dameron, 306 N.W.2d 743, 745 (Iowa 1981).

The trial court ordered termination in spite of its finding A.D. does now have a safe home environment and in spite of a rather grudging conclusion there is nothing in the record to indicate A.D. does not love her son.

Our de novo review leads us to conclude there is much in the record to indicate she does love her son. She has consistently demonstrated a sincere desire to spend time and communicate with her boy. After voluntarily placing her son in foster care in the summer of 1986 and April of 1987 when she moved to Denison, she had regular visitation with J.W.D., often twice a week, while occasionally less. During her year's stay in Denison she returned home once a month to visit with her son. In October 1987, she initiated and received juvenile court permission to have visitation with J.W.D. at the Job Corps. This turned out to be unsuccessful because she was unable to secure off-campus housing. During the Thanksgiving holiday he was with her for the weekend. During Christmas A.D. had eight visitation days. She also had telephone contact with him and wrote him once or twice a month during this year.

Since returning to her home town she eventually had unsupervised visits. She had four visits in June 1988; three, including an overnight visit in July; four weekend visits totaling seven one-half days in August; and ten days and nights in September.

The trial court found J.W.D. needed treatment and his mother was unable to provide it. However, there has been no finding that J.W.D. needs any specialized, professional treatment beyond his existing placement in a special preschool. There is not clear and convincing evidence to support the conclusion A.D. causes these behavior problems. The aggressive behavior was first reported in mid-May 1988. The month immediately prior to that, the social worker reported J.W.D. was getting along well in the foster home. A.D. had been seeing J.W.D. on a regular basis from the time he was placed in foster care in 1986. The placement appears to be helping J.W.D. His behavior has improved and his preschool teacher testified she sees no relationship between J.W.D.'s inappropriate behavior and his visits with his mother. The teacher also testified A.D. was able to modify her own behavior successfully after one suggestion from the teacher. Although A.D.'s meetings with the psychologist were not successful, we are not convinced the State has exhausted its repertoire of methods for teaching effective parent-child discipline techniques.

The record contains three child abuse reports, only one of which concluded A.D. was the perpetrator. In this instance, the abuse was categorized as denial of critical care-lack of supervision. It was based on a report from A.D.'s roommate that A.D. left J.W.D. in a high chair in a back bedroom. A.D. stated she left the boy with A.D.'s eleven-year-old sister and that J.W.D. could climb out of the chair himself. When questioned, the roommate could not remember how long J.W.D. had been left in the high chair, but it wasn't more than fifteen minutes. The other two reports were inconclusive as to the nature or source of the injury.

This is an extremely difficult case. A.D. has clearly shown she loves her son and wants to continue to parent him. She was sixteen years old at his birth. She is mildly retarded. Her circumstances and skills have greatly improved since 1986. She has completed a year of training in the Job Corps and appears to have finally settled down and found herself an adequate living situation. She has shown marked improvement in her ability to take care of her own personal hygiene and that of her son and new baby.

A.D. is most likely not the best parent J.W.D. could have. There are smarter, more affluent, and more educated folks around. Nevertheless, she is the boys' biological mother and as such she has a right "far more precious than property rights" to parent her child unless the State

cannot protect him from harm. The State's duty is to see that he receive a minimal level of care, not the maximum. The State has not shown by clear and convincing evidence it is unable to protect J.W.D. from harm which will continue to justify his adjudication as a child in need of assistance.

REVERSED.

Oxberger, C.J., concurs; Donielson, J., dissents.

DONIELSON, J. (dissenting)

I respectfully dissent. The record reveals A.D. has a history of frequent moves, is unable to manage money or a job, and cannot properly discipline and care for her son. Despite numerous attempts to help improve her skills, A.D. is still not able to maintain her home without day-to-day supervision.

Much of A.D.'s inability to provide a proper home for her son may stem from her own mental disability. While a mental disability alone is not a sufficient reason for termination of a parent-child relationship, In Interest of Wardle, 207 N.W.2d 554, 563 (Iowa 1973), it is a relevant factor to be considered in a termination proceeding. Iowa Code § 232.116(2)(a) (1989). The effect of A.D.'s reduced mental functioning is compounded by the presence of J.W.D.'s special needs. He has been diagnosed as falling within the borderline-to-low-average functional ability range.

J.W.D. would suffer harm if returned to his mother's custody. While A.D.'s efforts to improve herself are laudable, we cannot force J.W.D. to continue in the parentless limbo of foster care while he awaits his mother's maturity. In Interest of T.D.C., 336 N.W.2d 738, 744 (Iowa 1983).