

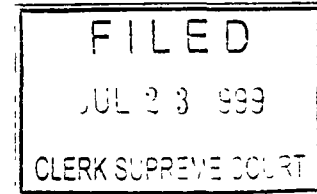
IN THE COURT OF APPEALS OF IOWA

No. 1999-68 (9-223) / 98-2010

Filed July 23, 1999

IN THE INTEREST OF V.T. and E.T., Minor Children,

V.T., Father,
Appellant.



Appeal from the Iowa District Court for Woodbury County, Mary L. Timko,
Associate Juvenile Judge.

Father appeals the termination of his parental rights to his two sons.

REVERSED AND REMANDED.

William L. Binkard, South Sioux City, Nebraska, for appellant.

Thomas J. Miller, Attorney General, Charles K. Phillips, Assistant Attorney
General, and Dewey Sloan, Assistant County Attorney, for appellee-State.

Marchelle Denker, Sioux City, guardian ad litem for minor children.

Kayla Stratton, Assistant Public Defender, Sioux City, for mother.

Heard by Sackett, C.J., and Mahan and Zimmer, JJ.

SACKETT, C.J.

Vincente T. appeals the termination of his parental rights to his two sons, Vincent, born in 1994, and Eric, born in 1995. He contends there is not clear and convincing evidence his sons' best interests are served by terminating his parental rights.¹ We reverse and remand to juvenile court.

The children were living with their mother in September of 1995. At the time, she and Vincente were not married, although he was involved with the family. Eric was hospitalized and diagnosed with failure to thrive. After Eric's release from the hospital, a nurse made weekly visits to the mother's home to offer guidance in caring for the children. The mother claimed at the time she did not know who fathered the children. A Child Protective Services investigation was also initiated. The children were removed from their mother's care in May of 1996.

In June of 1996, Vincente identified himself as the father of the children and said he had lived with the family for three years. Vincente and the mother were then married.

In August of 1996, the children were found to be children in need of assistance under Iowa Code sections 232.2(6)(c)(2) and (g)(1995).² They remained in foster

¹ The court also terminated the parental rights of the children's mother. She has not appealed.

² From Iowa Code sections 232.2(6)(c)(2) and (g):

"Child in need of assistance" means an unmarried child:

....

c. Who has suffered or is imminently likely to suffer harmful effects as a result of either of the following:

care and have been in foster care during the course of this proceeding. The parents were granted supervised visitation.

At the time of removal, Vincente suffered from alcohol abuse; the mother abused illegal drugs. Vincente spoke Spanish, but his command of the English language was poor. The mother spoke both English and Spanish.

By February of 1997, the mother's visits with the children were suspended; Vincente's were not.

During the course of the proceedings Vincente got a work permit; he found a job; he completed an alcohol treatment program and has remained sober; and he got a telephone, an automobile, a driver's license, and a house. The mother continued to use illegal drugs.

In March of 1998, the State filed a petition to terminate the parental rights of both parents under Iowa Code sections 232.116(1)(d), (g), and (k) (1997).³ The

....

(2) The failure of the child's parent, guardian, custodian, or other member of the household in which the child resides to exercise a reasonable degree of care in supervising the child.

....

g. Whose parent, guardian, or custodian fails to exercise a minimal degree of care in supplying the child with adequate food, clothing or shelter and refuses other means made available to provide such essentials.

Iowa Code § 232.2(6)(c)(2) and (g).

³ Iowa Code section 232.116 provides, in part:

1. Except as provided in subsection 3, the court may order the termination of both the parental rights with respect to a child and the relationship between the parent and the child on any of the following grounds:

....

petition claimed Vincente had not completed the case permanency plan nor taken

d. The court finds that all of the following have occurred:

(1) The child has been adjudicated a child in need of assistance pursuant to section 232.96.

(2) The child has been removed from the physical custody of the child's parents for a period of at least six consecutive months.

(3) There is clear and convincing evidence that the parents have not maintained significant and meaningful contact with the child during the previous six consecutive months and have made no reasonable efforts to resume care of the child despite being given the opportunity to do so. For the purposes of this subparagraph, "significant and meaningful contact" includes but is not limited to the affirmative assumption by the parents of the duties encompassed by the role of being a parent. This affirmative duty, in addition to financial obligations, requires continued interest in the child, a genuine effort to complete the responsibilities prescribed in the case permanency plan, a genuine effort to maintain communication with the child, and requires that the parents establish and maintain a place of importance in the child's life.

....

g. The court finds that 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 child has been removed from the physical custody of the child's parents 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.

....

k. The court finds that all of the following have occurred:

(1) The child has been adjudicated a child in need of assistance pursuant to section 232.96 and custody has been transferred from the child's parents for placement pursuant to section 232.102.

(2) The parent has a severe, chronic substance abuse problem, and presents a danger to self or others as evidenced by prior acts.

(3) There is clear and convincing evidence that the parent's prognosis indicates that the child will not be able to be returned to the custody of the parent within a reasonable period of time considering the child's age and need for a permanent home.

Iowa Code § 232.116(1)(d), (g), and (k).

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affirmative steps to assume his duties as a parent. Vincente's parental rights were terminated in October of 1998 under Iowa Code sections 232.116(1)(d) and (g). The court found:

Vincente has wasted more than the two years that have already been given to him to place himself in a position to have the children returned to his care. Although he has cooperated more consistently with services and visitation than [the mother] has, he has not done so to such a level that this court has confidence that he would be able to parent the children without them continuing to be Children in Need of Assistance for a significant period of time. . . .

. . . Vincente has been fairly consistent in his visitation, however, it has remained supervised twice per week for four hours. This has been due to the fact that his work schedule has prevented an increase as well as the fact that he has not followed through on various responsibilities outlined by the Department of Human Service including, but not limited to the citizenship issue, English classes, day care, and appropriate housing.

Vincente appeals asserting termination of his parental rights is not in the best interests of his two sons.

We review proceedings to terminate parental rights de novo -- we review the facts as well as the law and adjudicate parents' rights anew. *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981). The Iowa Supreme Court has recognized there exists a parental interest in the integrity of the family unit, but that such interest is not absolute and may be forfeited by certain conduct. *Id.*

The State has the burden to prove the grounds for termination by clear and convincing evidence. *In re T.A.L.*, 505 N.W.2d 480 (Iowa 1993). Once the court concludes all the criteria for termination of parental rights have been satisfied, the

court must, still, make a determination as to whether termination would be in the child's best interest. *In re T.R.*, 483 N.W.2d 334, 337 (Iowa App. 1992).

The first question is whether grounds for termination have been shown by clear and convincing evidence. Iowa Code section 232.116(1)(d)(3) requires there to be a clear showing that the parents have not maintained significant and meaningful contact with the child during the previous six months. Vincente has fully utilized the opportunities the State has provided for contact with his children. Vincente was given visitation rights on the condition he undergo a chemical dependency evaluation and a psychosocial evaluation. In September of 1996, he completed both of the evaluations and he began what are termed "parent-skills supervised visits" with his children. He attended nearly all scheduled visits. The visits went well. Vincente was observed as being affectionate toward the children and receptive to parenting advice given to him. By May of 1997, Vincente was having two-hour visits twice a week with the children and was allowed one unsupervised visit of two hours on Memorial Day. During the summer of 1997, Vincente was having what were called "partially unsupervised visits" with the children and by September he was having unsupervised visits with the children. The State has failed to establish by clear and convincing grounds Vincente failed to maintain the necessary contacts with the children.

To terminate under Iowa Code section 232.116(1)(g)(4), the State must show by clear and convincing evidence the children cannot at the present time be returned to the parent's home.

There is a rebuttable presumption the best interests of a child are served when custody remains with the natural parents. Iowa Code § 232.1; *In re S.J.*, 451 N.W.2d 827, 830 (Iowa 1990); *In re Chad*, 318 N.W.2d 213, 218 (Iowa 1982) (citing *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 1394-95, 71 L. Ed. 2d 599, 606 (1982) (“[F]undamental liberty interest of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State”).

Vincente has maintained contacts with his children by exercising visitation. He contends he has followed the State's directions and done what was necessary to assure he can provide for the children's return.

The State, in its cursory five-page brief, argues it would not be in the best interests of the children to return them to Vincente's care. The State does not deny Vincente has completed a number of the requirements placed on him for his children's return. The State's position is he lacks motivation and has procrastinated in fulfilling the requirements of the case plan. The State also focuses on the fact Vincente has not divorced the children's mother.

In addition to attending classes for parents and exercising visitation, Vincente attended outpatient alcohol treatment at St. Luke's Gordon Recovery Center. He has to date remained sober. Marcos Paz, a counselor with St. Luke's, said "Vincente has been responsible in attending his scheduled individual, as well as group, sessions." As of the date of the termination hearing, Vincente had completed the St. Luke's

program and had been attending Alcoholic Anonymous meetings once a week since beginning the program. Vincente was told to get a car and a telephone, and he did.

At the termination hearing, the State focused on (1) Vincente's inability to speak English well, (2) his work status, and (3) the fact he was married to the children's mother and continued to be involved with her.

The children were found to be developmentally delayed at the time they were removed from their parents' care. The Area Education Association recommended the children be in an environment where only one language was spoken. Neither parent challenged this requirement at the time it was made. However, a young child who comes from a bilingual family should not be cut off from learning the language of his or her parent. In foster care, the children learned to speak English. The developmental delays were also the result of the children's hearing problems. The children have recently had tubes placed in their ears which improved their hearing and accelerated their progress.

Vincente has lived in the United States for more than six years. He does not speak English well. The State contends he has been apathetic toward attending English as a Second Language classes. He has attended some English as a Second Language courses; his English has improved and he plans to continue attending the classes. Vincente communicates with his children in English during visits. Vincente's social worker is able to carry on a telephone conversation with him without the assistance of an interpreter. Unlike the juvenile court, we are unwilling to consider

Vincente's nominal command of the English language a factor in assessing the termination.

The juvenile court also considered Vincente's citizenship status. At the time of the termination hearing, Vincente had a work permit that was to expire two weeks after the hearing. Vincente testified he planned to renew his work permit and would like to remain in the United States to raise his children. While the State contends he could have renewed the work permit earlier, there was no evidence it could not be renewed. Vincente was confident his work permit would be renewed and he would be able to work toward permanent resident status.

Brenda Langmack, a social worker at Crittenton Center who had supervised the visits between Vincente and the children, testified she supported termination because of the time the children had been in foster care. She also conceded the question of whether to terminate Vincente's parental rights was "a pretty close call." Until a few months before the termination hearing, Langmack supported reunification of the family.

Department of Human Services caseworker Judy Gustad, who had been working with Vincente and his children since June of 1997, acknowledged Vincente made efforts to be reunified with his children for sixteen months prior to the termination hearing. The law requires "a full measure of patience with troubled parents who attempt to remedy a lack of parenting skills." *In re A.C.*, 415 N.W.2d

609, 613-14 (Iowa 1987). The underlying issue is whether the parent is beyond help. *In re R.B.*, 493 N.W.2d 897, 899 (Iowa 1992).

Vincente has expressed a wish to remain in the Sioux City area; he has a twin brother and a younger brother who live in the Sioux City area who will be able to assist with the children. Vincente also remains in close contact with his parents and other siblings in Mexico. He has a strong love for and a bond with his children.

While the move to terminate Vincente's parental rights at this juncture appears to be motivated by a desire to place the children in a permanent home, we cannot assume termination assures these children a permanent home. While in the State's care, the children have lived in five foster homes and there is no guarantee of any permanency should termination be affirmed. There is not clear and convincing evidence to support a finding the children cannot be returned to their father's care. We reverse the termination and remand to juvenile court.

REVERSED AND REMANDED.