

IN THE COURT OF APPEALS OF IOWA

No. 1-286 / 91-342

FILED

NOV 26 1991

CLERK SUPREME COURT

IN THE INTEREST OF M.M., A Child,

J.M., Mother,

Appellant,

T.M., Father,

Appellant.

441

Appeal from the Iowa District Court for Dubuque County,
Joseph Moothart, District Associate Judge.

Both parents of a child appeal the termination of their
parental rights. **AFFIRMED IN PART AND REVERSED IN PART.**

Stuart G. Hoover of Bauer & Heckmann, P.C., Dubuque,
for appellant mother.

Paul J. Kaufman, Dubuque, for appellant father.

Bonnie J. Campbell, Attorney General, Kathrine S.
Miller-Todd and John M. Parmeter, Assistant Attorneys
General, for appellee State.

Heard by Oxberger, C.J., and Schlegel and Hayden, JJ.,
but decided en banc.

HAYDEN, J.

The child in question, M.M., is a girl born in April 1988. At the time of her birth, her parents were married. The marriage has since been dissolved.

The child's father, T.M., is an alcoholic with a violent temper. He frequently beat the mother and was arrested ten times for assaulting her. He was also arrested for assaulting one of M.M.'s older brothers. On this occasion, T.M. became intoxicated and kicked the child in the head. The boy required six stitches. The father made little progress resolving his drinking problem prior to May 1991.

The child's mother, J.M., loves her children, however, her own emotional and intellectual limitations have prevented her from providing proper care for them. Her violent marriage to T.M. plus negative influences from her family of origin have also interfered with her parenting abilities.

During infancy M.M. was diagnosed as a failure to thrive infant. In January 1989, when she was approximately nine months old, M.M. was placed in foster care and has remained in foster care continuously since that time. In March 1989 she was adjudicated to be a child in need of assistance. M.M.'s older siblings and half-siblings have been adjudicated children in need of assistance and have also been removed from the parents' home and placed in foster care.

Relying on Iowa Code section 232.166(1)(g), the juvenile court terminated the parental rights of both parents with respect to M.M. Both parents appeal the termination order. Each challenges the sufficiency of the evidence to establish the child cannot be returned to his or her care. The mother also raises several additional issues. Oral arguments were heard on September 5, 1991. On September 6, Chief Judge Leo Oxberger granted the mother's request to supplement the record. The supplemental appendix filed October 4, 1991, with this court reveals the juvenile court returned two older children to the parents' custody. The State also filed a supplemental appendix with this court on October 24, 1991.

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, 105 S. Ct. 1212, 84 L. Ed. 2d 353 (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 to Dameron, 306 N.W.2d at 745); see also In re A.C., 415 N.W.2d 609, 613 (Iowa), cert. denied, 458 U.S. 1008 (1987).

In the present case, the juvenile court terminated the parental rights of both parents relying on Iowa Code section 232.166(1)(g). This statute permits the juvenile court to terminate the parent-child relationship if the child is three years of age or younger, has been adjudicated a child in need of assistance, has been placed out of the parent's custody for six of the last twelve months, and there is clear and convincing evidence the child cannot be returned to the custody of the parent at the present time. Iowa Code § 232.166(1)(g) (1991). We must examine the record to determine whether there is clear and convincing evidence the child cannot be returned to the parents' custody. We address this issue with respect to the father first.

T.M. was offered extensive parenting and nurturing services between January 1989 and May 1990. He failed to attend most of these classes. T.M. often became intoxicated and was physically abusive to J.M. On one occasion, T.M. physically assaulted one of the children causing injury. T.M. admitted he becomes violent when he drinks. He has spent considerable time in a correctional facility as a result of his assaultive conduct.

Although T.M. and J.M. are divorced, the supplemental appendix reveals T.M. has moved back into the family home. The supplemental appendix also reveals T.M. has made progress in addressing his substance abuse problem. He completed an inpatient alcohol treatment program in May 1991. Since that time, he has regularly attended Alcoholics Anonymous. However, in August 1991 T.M. relapsed.

When the juvenile court returned the two older children to the parents' custody in September 1991, the following conditions were imposed:

The children's father . . . shall be completely compliant with the case plan and with attendance at [sic] at least two A.A. meetings per week and complete abstinence from use of alcoholic beverages. [J.M.] shall be required to report any relapse by [T.M.] to the Department, and the children's father shall thereby be removed from the family home.

Unfortunately, as revealed in the State's supplemental appendix, in October 1991 T.M. was charged with public intoxication and assault with injury upon J.M. As a result, the district court entered a no-contact order.

We determine there is clear and convincing evidence M.M. cannot be returned to the custody of her father. Termination of the father's parental rights was proper. We affirm the juvenile court's termination of T.M.'s parental rights to M.M.

The mother also challenges the sufficiency of the evidence to establish the child cannot be returned to her

care. At first J.M. was somewhat reluctant to participate in the parenting and nurturing programs. Eventually, she accepted responsibility and admitted her need to improve her parenting abilities. She made a sincere effort to learn and implement the parenting skills taught in various classes. As a result, her parenting abilities have improved. The evidence shows J.M. has looked after the health of M.M. It was J.M. who brought M.M.'s health problems to the attention of medical personnel when M.M. was diagnosed as a failure to thrive infant. While in foster care, M.M. was physically abused. It was J.M. who took note of the abuse and instigated the removal of M.M. from the foster home. J.M. joined a battered women's group and ended her abusive marriage with T.M. The supplemental appendix reveals she has made great strides in accomplishing various goals including finishing nurse's aide training, continued employment for one year, and locating suitable, clean, and safe housing for the family.

We hold there is insufficient evidence to terminate the parental rights of J.M. We reverse the decision of the juvenile court with respect to J.M. In light of our holding, it is unnecessary to reach J.M.'s other issues raised on appeal.

AFFIRMED IN PART AND REVERSED IN PART.

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 concur with the majority's well-written opinion in all respects except I disagree with their decision to terminate the parental rights of T.M., the father.

I agree the State has met its burden of showing by clear and convincing evidence that the father's parental rights should be terminated. The problem in terminating his parental rights, we are also terminating his obligation to contribute to the support of this child. There is no reason to relieve him of this obligation to support, leaving the total support obligation to the mother and the State. I, therefore, would not terminate his parental rights but would remand to the trial court to (1) determine the parents' income and enter such support orders as directed by the child support guidelines, and (2) to take evidence to determine what orders as are necessary to keep the father away from the mother and child, and enter such orders.

The father clearly should not have contact with the mother or the child at this time. It is possible at some time in the future he may control his drinking problem and show the child would be safe in his presence. If such were the case at that time, the restrictions on contact could be reviewed.