IN THE COURT OF APPEALS OF IOWA

No. 2-643 / 92-346

IN THE INTEREST OF T.A.L., I.T.A. and M.R.H., Minor Children,

J.H., a/k/a J.C., Mother,

Appellant,

W.H., Father of M.R.H.,

Appellant.

FILED
MAR 30 1993
CLERK SUPREME COURT

Appeal from the Iowa District Court for Woodbury County, Cameron C. Arnold, District Associate Judge.

J.H. appeals from the termination of her parental rights as to all three children. W.H. appeals from the termination of his parental rights as to M.R.H. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.**

Timothy W. Shuminsky of Shuminsky, Shuminsky & Molstad, Sioux City, for appellant J.H.

Patrick C. McCormick, Sioux City, for appellant W.H.

Bonnie J. Campbell, Attorney General, John M. Parmeter, Special Assistant Attorney General, and Judy Sheirbon, Assistant Attorney General, for appellee State.

Elizabeth Rosenbaum of Munger, Reinschmidt & Carter, Sioux City, guardian ad litem for minor children.

Heard by Donielson, P.J., and Hayden, J., and McCartney, S.J.*

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

McCARTNEY, S.J.

The appellants, J.H. and W.H., appeal from the decision of the district associate court terminating their parental rights in their respective children.

We affirm in part, reverse in part, and remand for further proceedings.

J.H. and W.H. were married in 1988. J.H., at the time of marriage, had two minor children, T.A.L., born December 28, 1986, and I.T.A., born July 7, 1988. These two children were by two separate fathers.

J.H. and W.H. have a minor daughter, M.R.H., who was born August 15, 1989.

The decision appealed from terminated the parental rights of J.H. in her three children and terminated parental rights of W.H. to his daughter, M.R.H. The decision was filed March 7, 1992, six months after the hearing.

In early February 1990, W.H. and J.H. and the three minor children were residing together in the Sioux City area, and each parent independently of the other telephoned the police department and the Department of Human Services (DHS) seeking intervention with respect to the three children.

J.H. based her request for intervention upon her own physical abuse of the children. J.H. provided little care for the three children and W.H. sought intervention because

he was unable to care for his two stepchildren, T.A.L. and I.T.A., as well as care for M.R.H.

As a result of these separate requests, the children were made the subject of an order for emergency removal on or about February 28, 1990. They were thereafter adjudicated to be children in need of assistance by the court on or about March 30, 1990. The emergency removal and the adjudication were agreed to by the parties, and although W.H. was not in attendance at the adjudicatory hearing, he was represented by counsel.

In March 1990 the children were placed in appropriate foster care, T.A.L. and I.T.A. being placed together with one foster family and their half-sister, M.R.H., being placed with another foster family.

The marriage of J.H. and W.H. was volatile and chaotic. J.H. went on drinking binges, being absent from the home for unexplained periods of time leaving W.H. with the responsibility for caring for the three children. W.H. also had personal problems, including some minor brushes with the law. Consequently, during 1990 and until the dissolution of their marriage in November of 1990, there were periods of reconciliation and of separation, all of which were highly-emotional.

After the adjudicatory hearing, DHS prepared a number of case plans designed to reunite the parents. Both were given goals to attain, but while J.H. was to receive

"family therapy" together with certain supervisory services, the plan provided W.H. no services designed to help him attain the goals set for him. The only services for W.H. consisted of monitoring the family's progress and supervised visits with M.R.H. DHS had contracted for these services from Lutheran Social Services (LSS) commencing in April 1990.

J.H., in large part, rejected the services, particularly those providing individual therapy for her. She was hostile and antagonistic to the efforts of the social workers, showed anger at the children, was sporadic in attendance at sessions provided her, and sporadic in visitation with her three children.

W.H., during a period of time from April to October 1990, was employed in Omaha, Nebraska. He, too, was sporadic in visitation, but did have visitation with M.R.H. approximately eleven times from April to the forepart of November 1990 when the parties' marriage was dissolved.

Although J.H. initially was regular in visitations, her visitations became sporadic, and in October 1990 her visitations ceased altogether. Within a month thereafter, she moved from the Sioux City area to the state of Washington. From that time on she had no contact with the children, DHS, or with LSS until the termination hearing held at the forepart of August 1991. She had remarried.

Although DHS in writing told W.H. of the goals he had to meet, no services were contracted for his use, except as set forth above, for approximately 15 months until May of 1991, some two and a half months before the termination hearing on August 5, 1991. W.H.and J.H were involved in "family therapy" but when they could not reconcile W.H. stopped attending in May, 1990.

W.H. remarried shortly after the dissolution of his marriage to J.H. on November 6, 1990. He had 2 more visitations in December 1990 with M.R.H. and on January 2, 1991, he asked LSS where to obtain services designed to help him attain the goals set for him and to avoid termination of his rights. LSS had not been authorized to provide him with such services. He was advised by LSS to contact his attorney or DHS or the guardian ad litem for the children.

After receiving this advice from LSS, W.H. contacted DHS who told him to return to LSS to determine what services were available. That organization then advised him to contact still another case worker. Services were finally provided by DHS through LSS in the middle of May, 1991 although W.H. made several inquiries prior to that time. In short he was handed from agency to agency and from worker to worker without DHS contracting for or providing any help until 2 months before the termination hearing.

The guardian ad litem for the children in January or possibly February of 1991 visited with the foster parents of M.R.H. inquiring as to their interest in adopting the little girl. The guardian ad litem also appears to have prepared and filed a petition for termination of parental rights insofar as M.R.H. was concerned which petition was later dismissed. The guardian ad litem also advised the foster parents of the necessity of an adoptive home study and when it should be conducted.

The pattern of visitation of M.R.H. by her father, W.H., increased in 1991, and from the first of January to the time of hearing, August 5, 1991, there were twenty-three visits of the little girl by her father.

In addition to those visits the case worker canceled one proposed visit and bad weather prevented three other visitations. These visitations were uniformly proper and appropriate with good interaction between W.H. and his daughter, all as reflected by the case worker's testimony and the records in this case. W.H. sought as late as May 1991 increased unsupervised visitations with his little girl and LSS was not adverse to these requests. Throughout the entire period, W.H. showed continuing interest in his daughter as reflected by his 36 visitations above noted.

Although visitations continued and increased subsequent to November 6, 1990 (and after the dissolution of the W.H. and J.H. marriage), DHS as early as November 19, 1990, in

their permanency plan recommended that the rights of W.H. in his daughter, M.R.H., be terminated. This recommendation was made even though six months later social workers were apparently agreeable to more unsupervised visits by W.H. with his daughter.

DHS, on March 27, 1991, reported that "only recently has (W.H.) requested visits with (M.R.H.)" by which time W.H. had visited M.R.H. 21 times in a year and had asked on several occasions how to obtain services to avoid having his parental rights terminated.

DHS contacted the State of Nebraska Department of Social Services sometime prior to February 4, 1991, requesting a home study of the home of W.H. in Dakota City, Nebraska.

The home study ordered by DHS was received from the Nebraska department on or about June 11, 1991. As late as July 22, 1991, LSS did not yet have this home study since its report of that date states that its recommendations would depend upon what the home study reflected regarding placement of M.R.H. with W.H. That report states that if the study recommended that M.R.H. be placed with W.H., W.H. should continue to visit with his daughter, working towards reunification, but if placement was not advised then termination of parental rights "should be considered." The LSS social service workers charged with providing counseling and assistance to W.H., still had not received

that home study two weeks before the termination hearing. Our review of these proceedings is de novo, and while we give weight to the fact findings of the district associate court, we are not bound by such findings. In re S.J., 451 N.W.2d 827 (Iowa 1990).

Parental termination proceedings must be proven by clear and convincing evidence. Id.

The primary concern is the best interest of the child. In re Dameron, 306 N.W.2d 743 (Iowa 1981). However, the "liberty interests 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." In re S.J., 451 N.W.2d at 830, (1982) citing Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388.

The parental rights of J.H. to the three children should be terminated and we affirm the district associate court ruling in this regard.

The allegations of the petition pertaining to J.H. have been supported by clear and convincing evidence. Her past physical abuse of a serious nature of the two older children and the unrebutted testimony that she remains at high risk for potential future child abuse support this conclusion. Her absences from the home, her refusal to accept services provided by DHS and LSS, her anger at the persons proffering such services, as well as anger directed at her children, further support the ruling.

T.A.L., I.T.A., and M.R.H. have been adjudicated children in need of assistance pursuant to Iowa Code section 232.96. Their custody has been transferred from J.H. pursuant to section 232.102, and those placements have lasted for a period of at least six consecutive months at the time of the termination hearing held in August 1991. Finally, there is clear and convincing evidence that J.H. has not maintained meaningful contact or significant contact with the children for more that 9-1/2 months and has made no reasonable effort to resume care of the children even though many opportunities to do so were offered. The provisions of section 232.116(1)(d) and the allegations of the petition as to J.S. have been met.

The relationship of W.H. to his daughter, M.R.H., poses substantially different factual questions and result in different consequences.

The petition alleges that W.H. failed to maintain meaningful contact with M.R.H.

Although various other reports refer to W.H.'s visits with his daughter as "sporadic," the number of visitations in 1990 were significant. It must be kept in mind that during that period of time W.H. and J.H. were undergoing a stressful dissolution, with the interests of all three children involved. Commencing with the decree of dissolution in the forepart of November 1990 and until August 5, 1991, when the termination hearing was conducted,

the record reflects another twenty-six visits with his daughter. These visits were appropriate with good interaction between W.H. and his daughter. Several visits during this period of time were canceled because of bad weather or because the foster family was on vacation or canceled at the direction of the case worker. This pattern of continuing visitation shows a clear interest and concern for his child and cannot be termed "sporadic" given the circumstances of his employment and place of residence some distance from the offices of LSS and the home of the foster parents. It is further noteworthy that social workers were becoming agreeable in the late spring of 1991 to increased unsupervised visitation indicating a growing awareness on their part that W.H. was making an appropriate effort.

In all 36 appropriate visitations negate the allegation of no meaningful contact.

The petition alleges that although services were offered W.H., M.R.H. is in imminent danger of abuse or neglect from W.H. despite his receipt of services.

The record clearly reflects that no parenting services were offered W.H. until May of 1991, or about two months prior to the termination hearing although he had inquired of DHS and LSS several times about the availability of services. He was sent from one agency to the other and from one case worker to another. The case plans reflect that the only services to be provided W.H. were to

supervise visitations and to monitor the progress of his family. Under these circumstances it is difficult to understand the conclusions that W.H. received or refused proffered services. For some inexplicable reason services were not made available until a short period of time before the termination hearing and some fourteen and one half months after the removal of the children.

There is no evidence of any abuse visited by W.H. upon his daughter. The nature of the child abuse founded was that he had pushed the older stepdaughter (T.A.L.) on the back of the head, that she fell to the floor and sustained a rug burn. This is the sole incident and it occurred in February 1990.

Consequently, there is no clear and convincing evidence that W.H. has "abused or neglected" M.R.H. as alleged in the petition.

W.H. has improved his life and the home study introduced at the hearing reflects a modest home, decently maintained with appropriate interaction between W.H. and his present wife and her two children from her previous marriage.

The allegations of the petition insofar as they relate to W.H. have not been proven by clear and convincing evidence.

We therefore reverse the order of the District Associate Court with respect to the termination of the

parental rights of W.H. and remand this matter to the juvenile court with direction to continue the foster care and to conduct a permanency hearing under the provisions of section 232.104 of the Code. If it is determined that continued placement of M.R.H. in foster care is appropriate, a review hearing should be held pursuant to that section. Appropriate parenting skills services should be provided W.H. by DHS. Further, upon remand, we direct that a different guardian ad litem be appointed to represent the best interests of M.R.H.

We affirm rulings of the district associate court in terminating the parental rights of J.H., but we reverse such order insofar as it terminated the parental rights of W.H. and remand the matter for further proceedings in accordance with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.