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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

IN THE INTEREST OF HENRY JOHANSEN,)
A Child,)
David Johansen and Carolyn Johansen,)
Appellants.)

Filed August 25, 1981

1-145
2-64809

Appeal from Hancock District Court - Ralph McCartney, Judge.

Natural parents appeal from juvenile court's order terminating their parental rights alleging the evidence is insufficient to justify termination of their parental rights on the ground that there is clear and convincing evidence that the child cannot be returned to their custody without subjecting him to the harm which originally justified his adjudication as a child in need of assistance. AFFIRMED.

Earl W. Hill, Kanawha, Iowa, for appellants.

Thomas F. Pronk of Templeton & Pronk, Garner, Iowa, attorney for Henry Johansen.

Thomas J. Miller, Attorney General of Iowa; John Black, Special Assistant Attorney General; and Francis C. Hoyt, Jr., Assistant Attorney General for the State of Iowa.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

DONIELSON, J.

Natural parents, David and Carolyn Johansen, appeal from juvenile court's order terminating their parental rights to their child, Henry, pursuant to section 232.114(5), The Code 1979. They allege the evidence is insufficient to justify termination of their parental rights on the ground that there is clear and convincing evidence that the child cannot be returned to their custody without subjecting him to the harm which originally justified his adjudication as a child in need of assistance.

Our review in this matter is de novo. Iowa R. App. P. 4; Klobnack v. Abbott, 303 N.W.2d 149, 150 (Iowa 1981). In reviewing the evidence we give weight to the trial court's findings of fact, but we will not abdicate our function as trier de novo on appeal. Iowa R. App. P. 14(f)(7). We affirm.

I.

The minor child, Henry, was born May 24, 1978, and was shortly thereafter removed from the Johansen's home and placed in emergency foster care by the Iowa Department of Social Services because of an altercation between his intoxicated parents requiring police intervention. On June 12, 1978, a child-in-need-of-assistance (CHINA) petition was filed alleging that the child was 1) in need of special care and treatment by his physical or mental condition which the parents were unable to provide, (2) without proper parental care because of the faults or habits of his parents, and 3) living under conditions injurious to his mental or physical welfare. The juvenile court adjudicated Henry a child in need of assistance on July 13, 1978, stating that he was "in need of assistance within the purview of chapter 232 of the 1977 Code of Iowa." The court ordered the child placed in the temporary legal custody of the Iowa Department of Social Services for "a minimum period of six months or until such time as the parents of said child can show that a suitable and stable home environment has been established." Hearings for review of the placement order were held on April 20 and September 20, 1979.

While Henry was in foster care the parents were referred to, and received services from, various social welfare agencies for their individual and marital problems. David was referred to a vocational rehabilitation counselor,¹ and Carolyn was employed at the county care facility under CETA Funding.² Both David and Carolyn were referred to the

¹Case closed due to failure to cooperate or respond to appointment letters.

²Terminated due to excessive absences, missed 34 days of work in 10 months, often without excuse.

Chemical Dependency Center,³ the Systematic Training for Effective Parenting program (STEP),⁴ and the homemaker-healthaide program. Since neither David nor Carolyn have been successful in finding or retaining employment, it was necessary for the Department of Social Services to assist them in getting WICS coupons, rental assistance, and general relief funds to insure they had a place to live and fuel to heat it.

On January 13, 1980, the county attorney filed a petition for termination of parental rights alleging that the juvenile court had specified terms and conditions for the parents to follow in order to provide a suitable and stable home environment for the child, that the parents had wholly failed to create a suitable, safe, and stable environment for the child, and that they appear incapable of so doing. On February 19, 1980, the juvenile court terminated the petitioners' parental rights. This appeal followed.

II.

The termination of David and Carolyn's parental rights was adjudicated pursuant to the statutory grounds found in section 232.114(5), The Code 1979. That section provides for termination of parental rights if the court finds that:

- a. The child has been adjudicated a child in need of assistance pursuant to section 232.96; and
- b. The custody of the child has been transferred from his or her parents for placement pursuant to section 232.102 for at least twelve months; and
- c. There is clear and convincing evidence that the child cannot be returned to the custody of his or her parents as provided in section 232.102.

No question is raised on appeal with respect to the requirements of subsections a and b. The only question raised by petitioners is whether there was clear and convincing evidence that the child cannot be returned to their custody.

In parental termination cases the primary, but not exclusive consideration, is the welfare and best interests of the child. In Interest of Lewis, 257 N.W.2d 505, 510 (Iowa 1977). Balanced against this interest is the parent's right to maintain the integrity of the family relationship, unless forfeited by conduct. Id., In Interest of Blackledge, 304 N.W.2d 209, 214 (Iowa 1981). There is a presumption that the interests of the child are best served by leaving him with his natural parents; however, that presumption must

³Sporadic attendance by both parties.

⁴Attended only one class, even though the meetings were held only three blocks from their home.

give way when, under the evidence, it conflicts with the State's duty as *parens patriae* to assure proper treatment to every child within its borders. Long v. Long, 255 N.W.2d 140, 143 (Iowa 1977); In Interest of Kester, 228 N.W.2d 107, 109 (Iowa 1975). Thus, the fundamental consideration is what the future holds for the child if he is returned to the custody of his parents. In Interest of Ponx, 276 N.W.2d 425, 433 (Iowa 1979). "Insight for this determination can be gained from evidence of the parents' past performance, for that performance may be indicative of the quality of the future care that the parent is capable of providing." In Interest of Dameron, 306 N.W.2d 743, 745 (Iowa 1981). Proof is required to be clear and convincing. § 232.114, The Code 1979.

The provisions of section 232.114(5) have recently been interpreted in In Interest of Adkins, 298 N.W.2d 273, 278-79 (Iowa 1980). In Adkins, the appellant conceded that subsections a and b had been satisfied. In determining whether the requirement of subsection c (that "the child cannot be returned to the custody of his or her parents") had been satisfied, the court stated:

It is conceded William and Vincent have been adjudicated children in need of assistance. § 232.114(5)(a). It is also conceded their custody has been transferred from George "for placement pursuant to section 232.102 for at least twelve months." § 232.114(5)(b). The fighting issue is whether this record discloses "clear and convincing evidence that the child[ren] cannot be returned to the custody of [their parent] as provided in section 232.102." § 232.114(5)(c). Subsection 232.102(6) provides that a CHINA placement of the child apart from its parents "should be terminated and the child returned to his or her home if the court finds by a preponderance of the evidence that the child will not suffer harm in the manner specified in section 232.2, subsection 5."

The court then quoted In Interest of Voeltz, 271 N.W.2d 719, 724 (Iowa 1978):

[The children] cannot continue in their parentless limbo. Child custody should be quickly fixed and little disturbed. In Interest of Kester, 228 N.W.2d 107, 110 (Iowa [1975]). These children have been living in foster homes for over three years; the longer they remain in foster care the more difficult a suitable adoption becomes. In re McDonald, 201 N.W.2d 447, 453 (Iowa [1972]).

The court then concluded in Adkins, 298 N.W.2d at 279, that the children could not wait out their formative years for their father to attain the maturity and stability to provide them proper parenting. See In Interest of Kelley, 262 N.W.2d 781, 786 (Iowa 1978).

In applying the principles established in Adkins, upon our review de novo, we find that the record does substantiate, by clear and convincing evidence, the juvenile court's finding that the child cannot be returned to his parents' custody because he cannot be protected from harm. We are persuaded that, based on present conditions and the

parents' track record, the parents cannot provide a suitable environment in the future.

In spite of the various social welfare services that have been provided to David and Carolyn to assist them in coping with their numerous personal and marital problems, the record below clearly indicates that the parents are unable to care for themselves without close supervision and are most certainly unable to care for a two year old child.

They are currently unemployed and have extremely poor work histories which make it unlikely they will obtain and hold future employment. The State Department of Social Services is on the verge of requesting a protective payee for the parties' ADC checks, at least in part, because David continues to make creative use of financial instruments. He frequently writes bad checks, with knowledge that there are no funds in the bank, and then asks businesses to hold the checks until he can repay them. At least one of his creditors complained to the police, but the case was settled without filing a criminal complaint. Only the goodwill of his creditors has prevented the filing of criminal actions against David.

David and Carolyn have no joint record as parents; however, David's individual track record as a parent in his previous marriage, although considered irrelevant by the dissent, is highly relevant.⁵ We should not ignore the fact that one son is in a Minnesota juvenile home and the other's location is unknown.

The record indicates David and Carolyn could not currently care for Henry without close supervision and makes no estimate of when, if ever, Henry could be returned to his parents' home. David is now 40 and Carolyn is in her early 20's; it appears very unlikely they will mature in time to take charge of Henry. We affirm the trial court's termination order so that Henry will not be "made to suffer indefinitely in a parentless limbo," Long v. Long, 255 N.W.2d 140, 146 (Iowa 1977), or be forced to wait out his formative years for his parents to obtain the maturity and stability to provide proper parenting. In Interest of Adkins, 298 N.W.2d 273, 279 (Iowa 1980).

AFFIRMED.

All judges concur, except Johnson, J., and Oxberger, C.J., who dissent.

⁵The dissent claims that the reports made to the juvenile court by the social worker, Jane Fisher, are "replete with hearsay, innuendo, and irrelevant material ... [and] their probative value is overshadowed by their unfairly prejudicial content." We find that the reports are both relevant and material. When they are read as a whole, rather than focusing on isolated quotations as the dissent does, they represent a fair and balanced appraisal of the Johansen family situation, and the efforts made to remedy their problems.

JOHNSON, J. (dissenting)

I dissent. I note first that, unlike the circumstances that existed in Adkins, there is no evidence or allegation of child abuse in this case. Secondly, the record indicates that trial court, in the CHINA proceedings, did not establish a reintegration plan except to order the child taken from the natural parents' custody until the parents could show that a suitable and stable home environment had been established. No support services were outlined by the trial court except that the parents were to attend chemical dependency counseling.¹ Moreover, the court adjudicated this child a child in need of assistance on the mere conclusory ground that the child was "in need of assistance within the purview of chapter 232 of the 1977 Code of Iowa." In light of these facts, I believe there is little basis, if any, to determine, as the court did in Adkins, that "there has been no palpable change from the conditions that led to the CHINA action . . ." or that the child would suffer the type of harm which necessitated original removal pursuant to the CHINA action. Furthermore, although I likewise am mindful of the principle that "children should not be made to suffer indefinitely in a parentless limbo," Long v. Long, 255 N.W.2d 140, 146 (Iowa 1977), or wait out their formative years for their parents to obtain the maturity and stability to provide them proper parenting, Adkins, 298 N.W.2d at 297, it is difficult to determine, from the findings made by the juvenile court at the CHINA hearings, to what extent and rate the parents were progressing and, if in fact progress was unsuitable, whether it was due to the type of manifest immaturity of the parents as that described in Adkins. As a result, I believe we are forced to rely exclusively on the record made at the termination hearing to determine whether the State has shown by clear and convincing evidence that these parents are incapable of providing a suitable environment for their child in the foreseeable future.

Turning to the evidence submitted for the juvenile court's consideration, I believe it is inadequate to support termination of these parents' rights. The juvenile court considered several reports submitted to it by Jane Fisher, a Hancock County social worker. These reports were submitted pursuant to section 232.96(4), The Code 1979, and,

¹ Section 232.102(b) provides, "[i]f the placement is extended, the court should determine whether additional services are necessary to facilitate return of the child to his or her home, and if the court determines such services are needed, the court shall order the provision of such services."

although they are admissible despite their hearsay content, I am mindful of the caveat indicated by section 232.96 as to their weight.²

I find these reports to be replete with hearsay, innuendo, and irrelevant material.³ Since much of their probative value is overshadowed by their unfairly prejudicial content, I give these reports, by themselves, little weight. Thus it is necessary to look for other evidence to substantiate the contents of these reports.

Although the probative value of these reports may be questioned, they do provide the only indications of what was expected of these parents in order for them to regain custody of their child. The social worker, Jane Fisher, recommended to the court, and evidently believed the court ordered, that these parents: 1) stay out of all legal trouble, 2) maintain sobriety, 3) cooperate with social services' budget and nutrition program, 4) carry on visitation with their child, and 5) maintain financial stability. Assuming that the parents were apprised of the fact that these were the conditions to be met in order for them to regain custody of their child, it was encumbant upon the State to prove by clear and convincing evidence that these conditions were not met and that the child thereby could not be returned to the environment without subjecting him to harm. The

² Section 232.96 provides:

4. A report made to the department of social services pursuant to chapter 235A shall be admissible in evidence if the person making the report does not appear as a witness at the hearing, but such a report shall not alone be sufficient to support a finding that the child is a child in need of assistance unless the attorneys for the child and the parents consent to such a finding. . . .

* * *

6. A report, study, record, or other writing made by the department of social services, a juvenile probation officer, a peace officer or a hospital relating to a child in a proceeding under this division shall be admissible notwithstanding any objection to hearsay statements contained therein provided it is relevant and material and provided its probative value substantially outweighs the danger of unfair prejudice to the child's parent, guardian, or custodian. The circumstances of the making of the report, study, record or other writing, including the maker's lack of personal knowledge, may be proved to affect its weight.

³ The following are examples of the hearsay, innuendo, and irrelevant material which exists throughout the reports.

Mr. Josten [the Johansen's landlord] indicated to my supervisor that the neighbors had complained to him that Mr. Johansen was trying to sell his food stamps so he could buy some gas. The people who rent the other house on this farm have refused to let them in their home, because they were over daily to borrow money.

only evidence offered by the State, in addition to the social worker's reports, was the testimony of State's witnesses at the termination hearing. Having reviewed this transcript, *de novo*, I find that the testimony neither substantiates evidence submitted in the reports nor does it otherwise provide proof of the State's allegations by clear and convincing evidence.

A. Avoid Legal Trouble. The reports submitted by Jane Fisher indicate that the parents have not avoided legal trouble. She states in her report of April 20, 1979, "[t]his social worker is concerned about David's failure to see the need to live within the law whether it be the use of financial instruments, driver's license, parental liability or his drinking." In her report of January 22, 1980, she stated, "Mr. Johansen has been reminded many times in the past two years, that writing bad checks can cause imprisonment, he still continues to write out bad checks and asks the businesses to hold them knowing there are no funds in the bank to cover them." Testimony at the termination hearing did not support allegations that David had been in legal trouble. David Martin, the Garner police chief, testified that there was nothing illegal in the way David obtained funds, he simply gave checks for people to hold until he could pay them back in 20 or 30 days. Martin also testified that there were no criminal complaints of record except that one of the holders of a check drawn by Mr. Johansen apparently did not have the same arrangement with Mr. Johansen as other creditors did, and considered the check drawn on insufficient funds. This creditor went to the police with a complaint, but the matter was settled later by reimbursement.

B. Maintain Sobriety. Jane Fisher, in her report to the court on June 30, 1978, stated "[m]y conclusion is that David and Carolyn are extremely irresponsible people and that David is a full-blown alcoholic, with possible mental deficiencies." In

The director told me that Henry was soaked in the rain coming into the home and felt it was inappropriate for him to be out there.

... at this time he borrowed \$50 from Mr. Korsa which financed his three day drunk.

Carolyn told this worker that David's brother in Norwood is also an alcoholic.

Carolyn told this worker that her brother was an alcoholic and he had one more problem in that he was a homosexual and lived in Minneapolis.

He has a juvenile son in Minnesota who has followed his footsteps and is now in a juvenile home.

her April 20, 1979 report, she states, "... David has not only continued to drink but has called this office when drunk, even though I reminded him I would have to report this to the court." Her report on January 22, 1980, states "[h]is attendance [at the chemical dependency center] has been sporadic, as has Carolyn's in the couple's group." The testimony of Chuck Sweetman, chemical dependency center worker, at the termination hearing was that David and Carolyn were making most Thursday group meetings and, although there was an initial attendance problem arising from transportation difficulties, he thought David was trying as hard as he could, but had limitations. He testified that after the September 20th hearing David's involvement improved remarkably. He further stated that, although he did not monitor David's anabuse treatment, he had no reason to believe that David was drinking at this time and that David's behavior indicated he was not.

C. Cooperation with Social Services' Budget and Nutrition Program. Jane Fisher stated in her report on September 13, 1979, that "[t]he cooperation with the homemaker service was good when they bothered to be home." Charlene East, the homemaker aide, testified at the termination hearing that although David was hostile at first, she thinks he looks upon her as a friend now and that David has been present at all meetings for the entire nine month period.

D. Visitation. The record indicates these visits have been made on a regular basis and only one meeting was missed. The child has spent time alone with the parents and, although he "fusses" when initially taken from the foster home, he seems well cared for and calm upon his return.

E. Financial Stability. The record indicates that these parents live in impoverished circumstances and are both unemployed. Although David has recently looked for work, he has a poor work record. Yet much of David's recent trouble has involved legitimate medical problems. Carolyn was unable to keep her recent job provided through the services of CETA because of chronic difficulties with attendance due to transportation problems, sickness and pregnancy. Initially her work progress was reported as excellent.

Jane Fisher recommended termination of David and Carolyn's parental rights at each review hearing and at the termination hearing. She concluded in her last report that she recommended termination because "the parents are unable to provide a stable environment for the child, they are unable to take care of themselves without total supervision by the department in order to keep a roof over their heads and food on the

table, as well as keeping them out of jail." Juxtaposed with this report was the testimony of Charlene East, a witness the trial judge characterized as "a witness of integrity and intelligence". Her testimony was that these parents were good housekeepers, and that the house was clean and neat. She stated that David works on the diet, fuel program and rent program, and has been doing a lot of the cooking. She testified that they are capable of caring for a two year old child with continued homemaking assistance at least three times a week, and that it would probably be several years before they could care for their child by themselves.

On this record I am not persuaded that the State has met its burden by clear and convincing evidence. While David and Carolyn may be far from ideal parents, their improvements far too few, and the time required perhaps too great to satisfy the supervising social workers, I nonetheless conclude the State has failed to show by clear and convincing evidence that there has been no palpable change in conditions, and that from the track record of these parents, present placement with assistance from social services, or future placement without assistance, would likely result in harm to the child.

I therefore would reverse trial court's judgment.

Oxberger, C.J., joins this dissent.