FILED
SEP 16 1994
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-370 / 94-0560

**IN THE INTEREST OF M.H. and C.H.,
Minor Children.**

J.K., Mother,

Appellant.

Appeal from the Iowa District Court for Muscatine County, James A. Weaver, District Associate Judge.

Mother appeals from an order of the district court terminating her parental rights to her two youngest children. **AFFIRMED.**

Neva Rettig Baker of the Baker Law Office, Muscatine, for appellant.

Bonnie J. Campbell, Attorney General, Gordon E. Allen, Deputy Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, and Christine Dalton, Assistant County Attorney, for appellee.

J. Michael Metcalf of Metcalf, Conlon, Siering & Poock, Muscatine, guardian ad litem for minor children.

Considered by Donielson, C.J., and Sackett and Huitink, JJ.

SACKETT, J.

The focal issue in this appeal is whether the trial court was correct in terminating the parental rights of a birth mother to two young children. We affirm.

Appellant, Juanita, is the mother of four children: Jennifer, born in 1979; Timothy, born in 1981; Matthew, born in 1983; and Cody, born in 1990. In March 1994, the court terminated Juanita's parental rights to Timothy and Matthew. On appeal Juanita contends: (1) the State failed to prove a statutory ground for termination by clear and convincing evidence; (2) there is not clear and convincing evidence the children will suffer harm if returned home; (3) the court failed to consider Iowa Code section 232.116(3) as to Matthew; and (4) she could be reunified with her children if ongoing services were offered.

Juanita has a limited mental ability. She left high school in eleventh grade. She married at eighteen. She has always lived at poverty level. She has problems assimilating the responsibilities of parenting. She has low self esteem and relies heavily on others. Her husband and the father of three of her four children has sexually abused them and other children.

Juanita has received counseling and a variety of services since early in 1984. Service providers have included, in addition to the Department of Human Services, Muscatine Health Center, Mississippi Valley Counseling Associates, Four Season Counseling, Muscatine Hospital,

Family Resources, St. Luke's Hospital, Mississippi Bend AEA, Grant Wood AEA, and University Hospital Schools. The services have not resulted in the desired improvement in Juanita's ability to take care of her children. There is considerable evidence Juanita has cooperated in the delivery of services and has followed orders to attend counseling and classes.

We review de novo. Iowa R. App. P. 4.

Juanita currently does not have the ability to care for her children without ongoing services. If Juanita is to have custody of her children, she will need support and money and services until the children reach their majority.

Juanita claims the State failed to prove by clear and convincing evidence the requisite statutory elements for termination. She concedes the State asserted three different grounds to terminate, namely, Iowa Code sections 232.116(1)(c); 232.116(1)(e); and 232.116(1)(g).

Termination is a drastic, final step which improvidently employed can be fraught with danger. Accordingly, to preserve the best interests of both parents and children, termination must only occur where more harm is likely to befall the child by staying with his or her parents than by being permanently separated from them. Alsager v. District Court of Polk County, Iowa, 406 F. Supp. 10, 24 (S.D. Iowa 1975). The State's interest in protecting children must be balanced against the parents'

countervailing interest in being able to raise their children in an environment free from government interference. Alsager, 406 F. Supp. at 22.

Under Iowa Code section 232.116(1)(c), parental rights can be terminated if a child had previously been found a child in need of assistance because of acts including neglect and the parents have been offered services to correct the problem but the problem continues. It is conceded Matthew and Cody have been found to be children in need of assistance. The question is whether there is clear and convincing evidence Juanita was offered services to correct problems she had raising the children and whether the problems that resulted in the children being found children in need of assistance still exist.

We agree with the State, Juanita was offered services. We also agree that problems continue to exist. There is a question whether the services offered were those that would correct the problems. Juanita now complains the services were not those that would correct the problems. She argues reasonable services were not provided and contends the State failed to make reasonable efforts to return the children to her home.

Juanita first points out, when the children were initially removed from her home, she was only permitted a single two-hour supervised visit a week and by the next hearing the visits were reduced to one hour due, in part, to budget constraints.

We agree with Juanita that continual contact between parents and children is necessary if families are to be reunited. Visitation between a parent and his or her child has been shown by numerous studies to be one of the most important, if not the most important, reunification services. See Shotton, Making Reasonable Efforts in Child Abuse and Neglect Cases, 26 Cal. W. L. Rev. 223, 249 (19--) (citing Fansel, D., On the Road to Permanency, CWLA, New York (1982) (children visited frequently are more likely to be released from foster care)); Weinstein, E., The Self-Image of The Foster Child, Russell Sage Foundation, New York (1960) (frequent visiting is associated with emotional well-being of children and parent).

The very limited visitation offered, together with the other services, did not assist Juanita to correct the problems. Juanita accepted the services offered. She did not at the time the services were offered object and contend the services were not those needed to correct her problems. Juanita's challenge to the type and focus of the services should have been made when the services were offered. See In re C.D., 508 N.W.2d 97, 101 (Iowa App. 1993). Juanita, not having objected earlier to the issue of whether the services were services to correct the problems, cannot raise this issue at this time. See id.

We have reviewed Juanita's challenges to the other two sections and find them to be without merit.

Juanita contends there is not clear and convincing evidence to support a finding the children cannot be returned to her home. Again, she advances reasonable efforts were not made to preserve the family. Juanita participated in the offered services. She cooperated and was frustrated she was not progressing toward having her children returned to her care. She points out on appeal that the state has the power to shape the history of the case and, when the court order put the children in foster care, the reunification was left for the most part to state agencies. Juanita advances when these agencies decided the children were better cared for in foster care, they made subtle determinations as to her progress.

Juanita makes a valid argument. We, too, are frustrated with the time, effort, and money spent on this family without obtaining the desired result of keeping the family together. Whether the fault is the services offered did not meet the family's needs or whether the fault is Juanita's is a difficult question. It is easy to place the blame entirely on Juanita. However, as her attorney so wisely points out, she is a poor, uneducated person who has limited mental abilities. She is at odds with the state of Iowa. As pointed out by the U.S. Supreme Court, the State's ability to assemble its case dwarfs Juanita's ability to mount a defense and shape the course the case takes. See Stantosky v. Kramer, 455 U.S. 745, 762, 102 S. Ct. 1388, 1399, 71 L. Ed. 2d 599, 612 (1992).

Juanita's arguments are well taken. However, statements of the problems she has with the course the state took in her case should have been made earlier. She cannot remain passive throughout the process and complain only when the case comes on for termination.

There is clear and convincing evidence the children cannot be returned to Juanita's home unless she has assistance. The record is replete with evidence of Juanita's inability to care for the children without assistance. A recitation of the many reports in the record would serve no useful purpose. The State has proved the children cannot be returned to Juanita's care unless she is given continuing supportive services.

Juanita next contends the trial court failed to consider Iowa Code section 232.116(3) as it pertains to Matthew. Matthew, at the time of the termination hearing, was approximately ten and one-half years of age. Section 232.116(3) provides, among other things, a court need not terminate parental rights if the child is over ten years old and objects to the termination.

Juanita does not argue that Matthew has formally objected to termination. She, rather, advances there was not evidence Matthew was aware of the pending termination and, consequently, his consent or objection has not been noted.

Juanita also argues the case manager testified she thought Matthew might suffer harm from a termination of his mother's parental rights until she learned of the bonding Matthew had with his preadoptive foster family. Juanita also points out the Court Appointed Special Advocate volunteer seems to have made decisions based on the superiority of the foster home and the foster parents' intention to adopt Matthew.

Juanita correctly points out the fact a foster family may provide better care than the natural parent is not sufficient reason to terminate the parents' parental rights. See In re S.J., 451 N.W.2d 827, 831 (Iowa 1990).

We recognize Matthew has affection for his mother. In terminating his parental rights, we terminate the legal ties Matthew has to his biological parents. We do not terminate the emotional ties. The foster parents also intend to adopt Cody. The boys have two other siblings, and they will lose their legal ties to them. We disagree with Juanita that there is evidence Matthew objects to termination.

Juanita's last contention is, even though she is not an ideal parent and will always have intellectual limitations and will need to rely on others to assist her with problems, she can, with ongoing assistance, care for her children. Juanita is poor and there is no evidence she has available help from an extended family. If Juanita had money to buy supportive services or if she had family

assistance, the State probably would not be petitioning to terminate her parental rights. Should there be resources to assist her as a handicapped parent so biological ties with her children need not be severed? Have we stereotyped Juanita because of her mental limitations? We have made an effort not to use stereotypes of mentally handicapped persons in assessing Juanita's abilities. See Note, Retarded Persons in Neglect Proceedings: The Erroneous Assumption of Parental Inadequacy, 31 Stan. L. Rev. 785, 786 (1979). Juanita's performance as a parent is measured in light of what would be expected of a parent in her circumstances. See In re Adoption of B.D.S., 431 A.2d 203, 207 (Pa. 1981).

Juanita's children have rights to a secure childhood. The children have bonded with their foster parents. The foster parents say they intend to adopt the children.[1] Will Juanita's children be better equipped for life being raised in a more secure environment by a stranger than by their biological mother? There is no clear answer.

Involuntary termination of parental rights is an area of the law with little historical direction. We recognize the importance of biological ties. We recognize parental rights are constitutionally protected. We recognize the rights of children to a secure childhood.

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1. The children have been put in a foster placement where it is the intent of the foster parents to adopt. The foster parents have resources superior to the mother, and the children have improved in some areas.

However, our supreme court has addressed similar factual situations and has set the stage for termination of parental rights under similar circumstances and has affirmed termination. We have in the past stated mental disability, standing alone, is not a sufficient reason for the termination of the parent-child relationship, but it is a contributing factor to the inability to perform the duties of a parent. See In re Wardle, 207 N.W.2d 554, 563 (Iowa 1973). Thus, mental disability is a proper factor to consider in determining whether a child is neglected to the point where his or her interest and welfare require termination. See In re A.M.S., 419 N.W.2d 723, 733-34 (Iowa 1988). In A.M.S., 419 N.W.2d at 734, the court stated termination was appropriate when the disabled parent lacks the capacity to adapt to the child's future needs. Iowa Code section 232.116(2)(a) states that in considering termination of parental rights such consideration may include whether the parent's ability to provide the needs of the child is affected by the parent's mental capacity or mental condition. In re J.W.D., 456 N.W.2d 214, 218 (Iowa 1990). We give consideration to the trial court's decision to terminate.

AFFIRMED.