

IN THE COURT OF APPEALS OF IOWA

FILED

MAY 28 1985

CLERK SUPREME COURT

IN THE INTEREST OF J.S., A Child;)

Filed May 28, 1985

STATE OF IOWA,)

5-108

84-1222

346

Appellant.)

Appeal from the Iowa District Court for Audubon County - G. T. Reilly,
Judge.

State appeals the dismissal of its petition to terminate the parental rights of
both natural parents of J.S. pursuant to Iowa Code section 232.116(5) (1983).
AFFIRMED.

Thomas J. Miller, Attorney General of Iowa, and Charles K. Phillips,
Assistant Attorney General, for appellant.

William D. Groteluschen of Madsen, Groteluschen & Tinker, Audubon, Iowa,
for appellees, R.K. and T.K., the natural parents.

Edward W. Bjornstad, Harlan, Iowa, guardian ad litem for the child.

Considered by Oxberger, C.J., Schlegel, and Hayden, JJ.

SCHLEGEL, J.

The State appeals the dismissal of its petition to terminate the parental rights of both natural parents of J.S. pursuant to Iowa Code section 232.116(5) (1983). We affirm.

I. Scope of Review. Our review of this case is de novo. In Interest of T.D.H., 344 N.W.2d 268, 270 (Iowa Ct. App. 1983). Under the terms of Iowa Code section 232.116, the State has the burden of presenting clear and convincing evidence in support of termination. Iowa Code § 232.116(2)-(5) (1983).

II. Merits of Termination. The State sought to terminate parental rights pursuant to Iowa Code subsection 232.116(5), which permits termination when the court finds:

- 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.

The sole issue in this case is whether the State has met the burden imposed by paragraph (c) of subsection 232.116(5). Paragraph (c) refers to section 232.102, which in turn refers to harm listed in subsection 232.2(5). The State's petition alleged that J.S., if returned to his parents' custody, would be subject to the following harm:

- 1) He is imminently likely to be neglected within the meaning of 232.2(5)(b);
- 2) He is imminently likely to suffer harmful effects as a result of the failure of his natural parents to exercise a reasonable degree of care in his supervision as provided in 232.2(5)(c)(2).

The State has failed to support those allegations with clear and convincing evidence. The record, in fact, is almost devoid of evidence in support of either allegation. Instead, the State tried to prove that J.S. would be physically abused

or suffer emotional harm if returned to his parents. The evidence presented, however, was not clear and convincing.

One of the theories presented at trial was that R.K., the mother of J.S., had engaged in a pattern of abuse and neglect of her children. It is undisputed that J.S. was adjudicated a Child in Need of Assistance and removed from the custody of the parents because he had been physically abused. Of R.K.'s six children, the four oldest have been placed in foster care at one time or another because of physical abuse or neglect. R.K. voluntarily terminated her parental rights to one of those children, a handicapped daughter.

The problem with the evidence of R.K.'s abusive behavior is that it occurred a significant length of time before the termination hearing. The termination hearing began October 19, 1983, was continued on different occasions, and was concluded January 11, 1984. The last incident of physical abuse occurred before J.S. was removed in January 1981. The last incident of neglect occurred in July 1982 when R.K. left two children at home and walked fifty miles to Jefferson.

Evidence of past abuse can be considered in a hearing to terminate parental rights. See In Interest of T.D.H., 344 N.W.2d at 271. The evidence shows, however, that R.K. and her husband T.K. have substantially changed their lives since the incident of neglect in 1982.

In September of 1982 the Ks moved to Jefferson, Iowa. R.K. has received treatment for her alcoholism. At the time of the hearing, except for two isolated incidents, she had not done any drinking for a period of two years. R.K. has had mental health counseling and marital and family counseling. She has completed the parent effectiveness training (PET) and systematic training in effective parenting (STEP) courses.

The trial court found R.K. complied with the caseplan prepared by the Department of Human Services and ordered by the Court. The State has not disputed that factfinding.

Exhibit 34 contains a report from Family Services. That report states, "R.K. knows the right things for a good mother to do, does them skillfully, warmly, without pretense." It also states, "T.K. works hard, R.K. has not been drinking and they have an appropriate home for children."

The record contains the following exchange:

THE COURT: Describe for me [R.K.] as she was in January of 1981 and then tell me who [R.K.] is today.

R.K.: In January of 1981, [R.K.] was somebody who drank a lot. I did a lot of drinking — hidden drinking that people didn't know, so I walked around pretty much in a stupor most of the time.

I could function normally and do what I had to do, and I would do just what I basically — I would never try any further than what I absolutely needed to do. I didn't really care about myself, my home.

My kids — They were fed and clothed and bathed, but probably not as well as they could have been. I didn't care about anything then. I would usually try to do the opposite of what somebody would tell me.

THE COURT: Describe for me the [R.K.] of today.

R.K.: I care about myself. I care about my home, my family — they come first in my life.

My attitude towards the agencies and stuff — I have learned a lot through the agencies. I'm hoping to continue and grow with those agencies and eventually be discharged from them whenever they feel it is appropriate.

THE COURT: Do you resent the involvement of the Juvenile Court?

R.K.: I know it was necessary at a point in my life, and I just have to go along with what the Court has to say.

More importantly, R.K. has had some opportunity to care for J.S. since the child was removed. J.S. stayed with R.K. and her family on two overnight visits. The evidence shows that R.K. acted appropriately during those visits. In one instance, J.S. was misbehaving. R.K. spanked J.S. without losing her temper and abusing the boy.

The father, T.K., has obtained a steady job as a carpenter. Further, there is no evidence in the record that he has abused J.S., or is likely to abuse J.S.

In light of the facts set out above, it is obvious that the State's evidence of past abuse is not clear and convincing evidence that J.S. cannot be returned to his natural parents. If such evidence were sufficient, the State would be able to terminate parental rights any time a child has been adjudicated in need of assistance. Chapter 232, however, requires a greater showing than that before parental rights can be terminated.

In an effort to bolster its case, the State presented much evidence about the alleged lack of bonding between R.K. and J.S., and about the bond between J.S. and his foster family. In fact, the issue of bonding became the most hotly contested issue of the trial. The trial court even went so far as to conclude in its ruling that the lack of bonding was "a result of the intervention of the Juvenile Court and its various agencies, not as a result of any fault on the part of the natural mother."

The evidence does not support that conclusion. Clearly, J.S. would not have been removed from T.K. if T.K. had not been at fault for abusing J.S. Moreover, the evidence does not show any inappropriate behavior by the Department of Human Services during the first few years that J.S. was removed from his family.

The fault for any alleged lack of bonding, however, is not relevant to this case. Lack of bonding is not a ground for termination of parental rights under the statute. Bonding, or lack of bonding, is only relevant to the extent that it relates to the statutory grounds for termination of parental rights.

The State tried to establish that the alleged lack of bonding would make it probable that R.K. would abuse J.S., and that J.S. would suffer emotional harm if forced to leave his foster family, with whom he has allegedly become bonded. Assuming that the State has established lack of bonding through the testimony of social workers and nurses, but without any testimony of a psychologist or

psychiatrist, the State still has not proved with clear and convincing evidence that J.S. is in imminent danger of being harmed if returned to his parents. The State's witnesses only testified to a possibility of future abuse. In light of the evidence of R.K.'s change, however, any possibility of future abuse is a matter of speculation.

It is certainly true that the return of J.S. to his natural parents will be stressful and has a potential to be emotionally harmful. Such harm, however, to the extent that it can be predicted, is not a statutory basis for terminating parental rights. See In Interest of Chad, 318 N.W.2d 213, 218 (Iowa 1982).

The State's reluctance to return J.S. to his parents is understandable. In foster care J.S. has gone from being a year old infant diagnosed as suffering from "failure to thrive" syndrome, to become a well developed, well adjusted, and intellectually superior child. J.S.'s foster family can undoubtedly provide more material comforts and a more intellectually stimulating environment than can the natural parents. The foster parents are also likely better skilled at being parents than the natural parents. But this kind of situation has been addressed by the Iowa Supreme Court, which stated:

Presumably every foster home will provide good care. The parent's right to have a child returned, however, is not measured by comparing the parent's home to the foster home or an ideal home. Rather the parent's right is established by negating the risk of recurrence of harm.

In Interest of Blackledge, 304 N.W.2d 209, 214-15 (Iowa 1981). "Courts are not free to take children from parents simply by deciding another home offers more advantages." In Interest of C. and K., 322 N.W.2d 76, 81 (Iowa 1982) (citations omitted).

The Department of Human Services decided that J.S.'s two elder siblings should be returned to the parents. The State has not presented clear and convincing evidence to show that J.S. should not be similarly returned.

AFFIRMED.