IN THE COURT OF APPEALS OF IOWA

No. 4-237 / 94-0256

FILED
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CLERK SUPREME COURT

IN THE INTEREST OF J.N. and T.N., Minor Children

S.N., Mother,

Appellant.

Appeal from the Iowa District Court for Delaware County, Jane Mylrea, Associate Juvenile Judge.

Mother appeals from an order terminating her parental rights. **AFFIRMED.**

Timothy G. Goen of Jenk & Goen, Dyersville, for appellant.

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

Mary Lou Tracey of Tracey & Tracey, Manchester, for minor children.

Heard by Sackett, P.J., and Habhab and Cady, JJ.

CADY, J.

This is an appeal from an order by the juvenile court terminating the parental rights between S.N. and her two children, J.N. and T.N. S.N. claims the termination was not supported by clear and convincing evidence and was not in the children's best interests. We affirm the termination on our review.

S.N. is the natural mother of J.N. and T.N. J.N. was born January 24, 1985, and T.N. was born February 19, 1987. J.N. was eight years old at the time of the termination hearing and T.N. was six years of age. Both children are boys. S.N. was thirty-one years old. The putative fathers of the children did not contest the proceedings.

S.N. began receiving voluntary parenting services from the Iowa Department of Human Services (DHS) in 1986. In April 1989, S.N. was arrested and incarcerated for intoxication and disorderly conduct. The incident resulted in emergency foster care placement for J.N. and T.N., after S.N. was unable to locate a temporary caretaker. It also followed prior founded reports of denial of critical care by S.N., and prompted the State to file a children in need of assistance proceeding.

J.N. and T.N. were found to be children in need of assistance following a hearing in June 1989. At a subsequent dispositional hearing, the children were ordered to remain in foster care. Services were implemented for

S.N., including substance abuse treatment and parent skill development.

During the four and one-half years which intervened between the first dispositional hearing and the termination hearing, the children remained in foster care. Numerous programs, services, and guidelines were established by the DHS in an effort to influence S.N. and enhance her parenting skills. During this same period of time, S.N. developed a relationship with a man, Duane, who also impacted her life. S.N. began living with Duane shortly after the children were removed from her care. Duane was eighteen years old at this time.

The initial services for S.N. included a substance abuse evaluation due to her history of alcohol abuse. The evaluation recommended S.N. complete a ninety-day in-patient program, followed by regular AA meetings. S.N. left the program after thirty days and did not subsequently attend support meetings.

S.N. maintained regular supervised visits with the children after they were first removed from her care. In April 1990 the juvenile court ordered unsupervised visitations between S.N. and J.N., the oldest child. J.N. was four years old at the time. The foster parents noted some behavioral problems following the visitations. J.N. also reported that Duane used inappropriate language.

By July 1990, S.N. and Duane had moved to Sigourney, Iowa, approximately ninety miles from the children's foster

home. S.N. did not have a driver's license or a car, so the DHS transported the children for visitation. The juvenile court commented in an order following the July 1990 review hearing that reunification between S.N. and her children appeared likely, and scheduled another review hearing for January 1991.

Shortly after the July 1990 review hearing, visitation was restricted for a period of time after J.N. reported that Duane physically abused him during a visit. J.N. also continued to be aggressive and demanding following visitations.

In December 1990, S.N. and Duane moved to Cedar Rapids, Iowa, near the foster home where the children resided. S.N. had quit her job. Duane was unemployed. DHS attempted to involve S.N. in vocational rehabilitation, but she failed to follow through with a required physical. S.N., however, responded well to parenting classes offered by DHS.

Prior to the June 1991 review hearing, J.N. was bitten by Duane and S.N.'s dog during a weekend visitation. The dog had not been vaccinated for rabies. DHS contacted the Humane Society, who removed the dog from the home. Duane responded angrily, and informed S.N.'s case worker she could no longer come to the home.

DHS informed S.N. that Duane's attitude was impeding reunification with her children, and suggested she separate from him. S.N. was unwilling to leave Duane.

Visitation became sporadic after the dog bite incident, although S.N. was permitted to exercise regular visitation at the DHS office in Cedar Rapids. S.N. visited the boys on three occasions between November 1991 and February 1992. Visitation continued to diminish until it eventually stopped. S.N.'s last visit with the children was in December 1992. She sent them two letters during 1993.

S.N. and Duane moved nine times since 1989, but have resided in Sigourney since December 1991. The distance between the foster home and Sigourney hampered visitation. S.N. was employed as a motel maid for the seven months prior to the termination hearing. She obtained a driver's license in October 1993.

J.N. and T.N. generally flourished while in foster care. J.N. is closer to S.N. than T.N.. Although the boys are special-needs children, they are considered to be adoptable.

S.N. complied with her case plan by eventually maintaining a stable residence. However, in addition to her lack of visitation, she did not attend AA meetings or mental health treatment as directed. The State was directed to file a petition for termination of parental rights. All service providers recommended termination of parental rights.

The juvenile court terminated S.N.'s parental rights under Iowa Code sections 232.116(1)(d) (lack of significant contact with the child and no reasonable efforts to resume

care), (e) (children out of parent's custody for at least twelve months and cannot be returned), and (h) (children in need of assistance based on finding of neglect with no change of circumstances after assistance offered) (1993). S.N. appealed. She claims the evidence did not support termination and the termination was not in the best interests of the children.

I.

Our review is de novo. In re S.J., 451 N.W.2d 827, 830 (Iowa 1990). We give weight to the findings of the trial court, but are not bound by them. Id. We review the facts and law, and adjudicate the parents' rights anew. In re Dameron, 306 N.W.2d 743, 745 (Iowa 1981).

Our juvenile statutes define the various grounds which permit a court to terminate a parent-child relationship. See Iowa Code § 232.116 (1993). The grounds must be proven by clear and convincing evidence. In re M.M., 483 N.W.2d 812, 815 (Iowa 1992).

Termination in this case was sought under Iowa Code sections 232.116(1)(d), (e), and (h). The essence of S.N.'s claim is that there was no clear and convincing evidence that: she has made no reasonable efforts to resume care of the children; the children cannot be returned to her custody; and, the circumstances surrounding the neglect of the children constitute imminent danger to them.

The sad reality of this case is that J.N. and T.N. have been removed from S.N.'s care for nearly five years prior to the termination hearing. S.N. has struggled with her role as a parent throughout this period, and exercised very little visitation during the two and one-half years before the termination hearing. She has been unable to balance her personal life with her role as a parent.

During the early years following the removal of the children, S.N. was responsive to parenting instruction and followed regular visitation. However, she also maintained a rather nomadic lifestyle and failed to follow through with substance abuse recommendations. When she finally secured a stable residence, it was far from the home of the children and created transportation problems with visitation. She also refused to leave her boyfriend after he forbid the case worker from coming to the house. S.N. had established a stable residence, but it was not for the benefit of the children. Visitation eventually stopped and S.N. made no real effort to follow the court-directed substance abuse treatment and mental health counseling.

S.N. insists her lack of visitation was not the result of disinterest in her children, but the lack of transportation. She argues DHS could have done more to assist her. However, S.N. chose to move away from her children knowing she had no driver's license, little finances, and no reliable transportation. Moreover, DHS provided transportation for S.N. to exercise visitation

until her boyfriend refused to allow the case worker in the home. S.N. chose to remain with her boyfriend after this.

We look at the past performance of a parent in resolving the difficult decision whether or not to sever a parent-child relationship. In re M.M., 483 N.W.2d at 814. Past conduct is often indicative of the quality of future care a parent is capable of providing. Id. After nearly five years, S.N. has had countless opportunities to show she has improved as a parent. The record shows she has not.

S.N. has not maintained contact with the children and has made no reasonable efforts to resume their care despite the opportunities to do so. We conclude there is clear and convincing evidence that the children cannot be returned to S.N.'s custody under section 232.102. The juvenile court properly terminated S.N.'s parental rights.

We also conclude that termination is in the best interests of the children. They are growing older and have been in foster care for too many years. They are adoptable. Their best interests will be served by the termination.

AFFIRMED.

Habhab, J., concurs; Sackett, P.J., dissents.

SACKETT, J. (dissenting)

I would remand for further evidence on the possibility of the children who are subject of this proceeding being adopted.

Jacob and Terry were initially removed from their mother, Sanda's, care in April 1989. Jacob was four years old and Terry was two years old. Jacob and Terry were removed because Sandra had a party and was incarcerated for intoxication and disorderly conduct. Sandra did not have an alternate caretaker for the children. Sandra is poor, has a limited education, and has a strained relationship with her own parents whom she claimed were abusive to her. She has not sexually or physically abused the children. Sandra has some problems with substance abuse and in her relationships with men. Jacob and Terry suffered no physical problems when taken from Sandra except they possibly were anemic. Jacob had behavior problems. Jacob and Terry were put in one foster home for a week, a second foster home for six months and, ultimately, on August 2, 1989, placed with Mr. and Mrs. X, a married couple who had been foster parents to some fifteen children with behavioral difficulties. Jacob and Terry now have been in foster care for over five years.

The majority find Jacob and Terry flourished in foster care. I wish I could agree. I recognize there are reports filed by the many different department personnel involved

with this family[1] that indicated Jacob and Terry were doing well in foster care. The problem is these conclusions by the workers were contradicted by the long-term foster mother, Mrs. X, who was interviewed in 1993, after Jacob and Terry had been in her care for four years. She found Jacob and Terry extremely difficult children to manage and characterized them as perhaps the most difficult of all previous fifteen children she cared for. Her interview tells a lot about the children's problems in foster care. Jacob appears to have no conscience, is manipulative and can manipulate successfully because he is bright. Jacob is a bully toward and threatening and dangerous to other children and evidences extremely aggressive behavior. He becomes very angry when he does not get his way. He once attempted to hit a child in the head with a metal truck. When angry, both Jacob and Terry attack other children's heads and appear intent upon inflicting injury. Jacob is sneaky and eavesdrops on conversations. Jacob threatens and intimidates other children and is quite selfish. Jacob does not have empathy for others. Once when Terry was injured, Jacob grabbed a toy out of Terry's hand and ran off. Once when Jacob was not allowed to watch a movie he wanted because other children selected a different one, he opened the safety gate on the steps so an eight-month-old baby who was living in the home would fall down the steps.

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1. There have been at least ten different Department of Human Services personnel working on the case.

When the baby fell down the stairs and people went to aid the infant, Jacob called out that he now intended to watch the TV show he selected.

Mrs. X indicated Jacob does have times when he is well behaved and under control but these times are short and they usually end with some sort of hostile explosion on Jacob's part. After four years in the foster home, Jacob had begun to express love for Mrs. X, but he continues to have a very strong attachment to Sandra. Mrs. X is concerned an adoption may not work for Jacob because of his attachment to his mother.

Recently, Jacob broke into the home of a neighbor who he had made friends with and played in their home. He stole. He showed little remorse and was not fearful of consequences. Jacob has also stolen from school and, when caught, shows little remorse. Jacob has been destructive in the foster home, and Mrs. X described Jacob as very controlling, arrogant, angry, and hostile.

Terry's behavioral difficulties in the foster home are less dramatic. But, Terry is destructive, stubborn, unyielding, and controlling. Terry is more able than Jacob to demonstrate love to Mrs. X. Terry shows affection for Jacob, although his affection is not reciprocated. Terry had moderate developmental delay, including a language delay. He moves rather slowly and can sit for hours and play without much movement or activity. Terry rarely runs and seems to be a lazy child. Until seemly and

consistently reprimanded, Terry played with his own feces, writing on walls and toilet seats with it and lying about his behavior when confronted in the act. Terry had a tendency to urinate on the walls and wastebaskets until this behavior was stopped with firm consequences.

The behavior Mrs. X describes Jacob and Terry have exhibited in their foster home is clear evidence Jacob and Terry were not "thriving." It is evident to me a number of their problems, particularly self-centeredness, absence of conscience, and inability to bond are attributable, in part, to the four years in foster care and being subject to sometimes inconsistent direction from a large number of service providers. Jacob also suffers from isolation from his mother to whom he is strongly bonded.

I also have serious reservations with the majority's conclusion Jacob and Terry are adoptable. As judges faced with deciding parental termination cases in this state, we get little information about the true picture of the number of children under the custody and care of the Iowa Department of Human Services whose parental rights we have terminated and who wait for adoptive homes. I learn more about the number of children in foster care from the Des Moines Register than I do from any evidence in any termination case. In 1992 the Register reported of the 263 special-needs children freed for adoption, only 138 were adopted. See, Phoebe Wall Howard, Special-needs Kids Pray

for New Families, New Lives, Des Moines Sunday Register, Oct. 10, 1993, at 1A.

There is some general testimony in this record about Jacob and Terry being adoptable. The testimony comes from a person designated as an adoption specialist with the department of human services. The adoption specialist also testified, "I think that whatever adoptive home we would find would need to be a family who would be willing to accept services to assist them with the transitioning of the boys into their home."

Any parent or parents who seek to adopt these children will be taking on an incredible assignment. I do not carry much hope these children with serious behavioral problems who are entering preteen years will be adopted. Particularly, with the long list of other children awaiting adoptive placement in this state. I envision it more likely Jacob and Terry will remain in foster care. When they are eighteen, they will be released from state care if they have not been incarcerated for unlawful behavior prior to that time. Their futures beyond that time I do not even want to predict. But, I have grave concern that, as adults, they will pose not only a threat to themselves but also a threat to society.

The majority said the best interests of Jacob and Terry support termination. The best interests of Jacob and Terry today would be to find them a perfect home with parents who would devote themselves nearly exclusively to working out

the children's problems. I find no evidence that option is available to us. Realistically, we have two options. Either terminate parental rights knowing there exists an extremely strong probability Jacob and Terry will remain in state care until they reach their majority or devise a plan to return Jacob and Terry to Sandra's care and offer services and support to assist Sandra in redeveloping bonds and caring for Jacob and Terry.

Sandra is not June Cleaver. But then, there are no real June Cleavers. Admittedly, Sandra has had difficulties in mothering Jacob and Terry but there is considerable evidence Sandra has cooperated with a number of services. But, Sandra falls back or the people in charge change and she is given different direction. Sandra becomes frustrated and when she exhibits her frustrations, she is charged with lack of cooperation. Would Jacob and Terry had more serious problems if they had been left in her care in 1989 and not put in state care? Frankly, it would be hard to find children who had more serious emotional and behavioral problems than Jacob and Terry have after four years in state care.

It is easy to blame Sandra for Jacob's and Terry's problems. I do not exonerate Sandra from responsibility. But, in this case, as in many other cases, those of us who are a part of the system deserve blame too. Jacob and Terry have been in the state's care longer than they have been in Sanda's care. At the time of the termination order

in January 1991, Jacob was nearly nine and had spent five years of his life in state care. Terry was nearly seven and had spent five years of his life in state care. The state of Iowa has spent substantial money on Jacob and Terry for department personnel, foster care, judges and court personnel, and the purchase of services from a number of private service providers.[2] I do not advance anyone had not been conscious in his or her efforts to help this family but, in retrospect, we have to question what has happened. Mrs. X who, obviously, has shouldered the greatest burden and probably has been the most poorly compensated, is directed not to become attached to these children.[3] Her statement tells me she has followed this directive. Jacob has serious problems in his relationship with Mrs. X and, on more than one occasion, Mrs. X indicated unless certain things happen, including supervision of Jacob's visitations with Sandra, she would not continue as his foster mother.

It is fairly accepted a child with Jacob's profile who

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2. The record reflect the following agencies have worked with the children and/or the parents and/or foster parents. Southern Iowa Economic Development Association, Drug & Alcohol Services, The Counseling and Assessment Service of Independence, Delaware County Department of Human Services, Tanager Place, and Four Oaks Children's Home of Cedar Rapids.

3. Temporary foster relationships must be designed with the knowledge they will almost certainly end in separation. In re A.C., 415 N.W.2d 609, 614 (Iowa 1987). It is crucial the children be under the care of foster parents who could and would refrain from seeking to bond a permanent relationship. Id. at 615.

suffers inability to bond has not had the stability of caretakers and concerned persons. What will a move to another caretaker's do to him? Sandra is criticized for constantly moving but little was done to assist her in establishing a stable residence. When a transfer was considered to a juvenile court in another county to assist Sandra, the juvenile referee denied the transfer. When Mrs. X complained about Sandra's visitation, rather than attempting to work out the problem, Sandra's visitations were restricted and supervised, putting a further strain on Sandra's chance to retain and strengthen the bonds with Jacob and Terry. Rather than working directly with Sandra and Jacob and Terry, a number of appointments were set up for Sandra that she was not able to attend. No provision was made to help Sandra supplement her transportation budget. There have been ten department personnel[4] on the case: Three county attorneys, Nussel, Schroeder and Walker; four juvenile referees, Allbee, Jacobs, Mylrea, and Glenn; plus four independent agencies. Sandra and Jacob and Terry received mixed signals and inconsistent direction.

With all the resources and personnel the state has, Jacob and Terry have suffered in state care. The children, particularly Jacob, love Sandra. There has been too much time, too many conflicting ideas, and too many workers and

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4. Holt, McBride, Reisner, Neuhaus, Corcoran, Bauer, Carlson, Reinsmoen, Shaw, and a person whose signature is not discernable.

caretakers. Jacob's problems have worsened. Will Jacob's problems be solved by terminating Sandra's parental rights and putting him in a different foster home or keeping him in the one he is in now where he has difficulties getting along and Mr. X wants him moved and he is isolated from others for several days when he misbehaves after being with Sandra? Will Jacob and Terry be helped by adding their names to those of the other children waiting for adoption in this state hoping they will be adopted and hoping the people adopting them will have the expertise to work with their problems? Particularly, when no one in state government seems to know how long the list is. Would Jacob and Terry be better off with a mother who has faults and limitations but who loves her children with the state providing services to the mother in a program designed to identify and enhance the mother's strengths as a parent?

I am unable to make an informed judgment on this issue without additional evidence of the State's future plans for these children after termination.

I would remand to the trial court to hold a hearing on the possibility of these children being adopted, including evidence of the number of children currently in the care of the department of human services waiting for adoption; the number of families in Iowa seeking to adopt older children; and the expertise of these families in dealing with the problems of hard-to-place children.