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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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IN THE INTEREST OF J.L.P., J.A.S.P., and J.E.S., Children.	)	
J.S., Mother,	)	9-89
Appellant.	)	88-1406

Appeal from the Iowa District Court for Scott County (Nos. 5724-0488, 5725-0488, and 5726-0488), Arlen V. Van Zee, District Associate Judge.

The mother appeals termination of her parental rights. **REVERSED.**

Michael T. Hines of McCarthy & Lammers, Davenport, for appellant mother.

Thomas J. Miller, Attorney General; Charles K. Phillips, Assistant Attorney General; and Gerda C. Lane, Assistant County Attorney, for appellee State.

Jerald Feuerbach, Davenport, guardian ad litem for the children.

Considered by Donielson, P.J., and Hayden and Habhab, JJ.

DONIELSON, P.J.

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J.S., the mother of three children, appeals from a juvenile court order terminating her parental rights. She challenges the sufficiency of the evidence to establish that the children cannot be returned to her custody. In addressing this issue, we will first set out the facts leading up to J.S.'s children being adjudicated children in need of assistance.

I. CINA Factual Basis.

This case involves three children: a boy born in August 1981, a girl born in July 1983, and a boy born in February 1986. The children have the same mother but three different fathers. Only one of the fathers was ever married to the mother, and that marriage has been dissolved. None of the three fathers has had any substantial degree of contact with his child.

The Iowa Department of Human Services became involved with J.S. and her family on September 26, 1986, after receiving a child abuse report from J.S.'s aunt. An investigator found no fresh injuries on the oldest boy, then five years old. However, the boy had a bruise on his buttocks and a square-shaped tender area on the his side above the waist. The three-year-old girl had five linear marks on her back which were determined to be the result of being struck with a switch. She also had a circular bruise on her back. The baby boy had no injuries.

J.S. indicated to the investigator on the following day that she physically disciplines her children when they are bad. J.S. stated she had tried using time-outs to discipline the oldest boy by putting him in his room. The boy would proceed to destroy the room, including ripping curtains off the wall. J.S. acknowledged using switches on the older boy and girl when they misbehaved and admitted some of the injuries noted on her two children were the result of whippings she had given them. The Department of Human Services referred the family to Bethany Home, Inc.

Bethany Home determined the children could remain in their mother's custody since they were residing with relatives who could provide support and assistance and monitor the care J.S. provided her children. Bethany Home received additional reports of beatings and other physical abuse from relatives on October 22, 1986. This incident was investigated and was unfounded. However, the department removed the children on October 23, 1986, because the aunt reportedly told J.S. to leave the home; thus, there would no longer be an adult relative in the home to report further abuse. The children were adjudicated children in need of assistance on November 26, 1986.

The mother's husband was incarcerated in February 1986. J.S. and her children had been living with her aunt beginning in April of 1986 until the summer of 1986 and

then again since August of 1986. J.S. had been attending a community college, working on a criminal justice degree. Her aunt and her aunt's adult daughter were providing baby-sitting services from 6:00 in the morning until the mother returned from classes after 5:00 in the evening. The mother indicated she only spent a few hours with her children on weekdays during the evening before putting them to bed. J.S. quit college in October 1986 because her oldest son complained to her that he did not get to spend enough time with her.

J.S. stated that she had seen her aunt use a switch on her children. The mother also pointed out that the abuse was not reported until the day after she told her aunt she was moving out. This move was apparently prompted by an eviction notice served on the aunt. J.S. had been giving the aunt all her A.D.C. money and food stamps. Her aunt was in charge of household finances and grocery shopping. J.S. learned that the eviction notice had been served because the aunt had not paid rent for several months despite J.S.'s financial contribution.

The aunt made other allegations of physical abuse, but J.S. denied physically disciplining her kids in any other manner than spanking with an open hand or using a switch or belt. Based on our careful review of the record, we find evidence that the aunt's reports may not be entirely true and correct. However, we do find, based on the mother's

admissions and the children's statements, that J.S. physically disciplined her children with a switch and belt to the extent that the children were wounded, bruised, and scarred. The children were removed from the home and adjudicated children in need of assistance pursuant to Iowa Code section 232.2(6)(b) (1985) because they were physically abused by their mother. J.S. did not deny the abuse and stated she was not aware such method of discipline was inappropriate as that is how she was disciplined as a child.

Following removal of the children in October 1986, the department developed a case plan setting forth the objectives of foster placement, J.S.'s responsibilities, and the requirements for regaining custody of her children. These included in part:

> being available for appointments and complying with DHS recommendations relating to the children and herself;
>
> resolving through counseling, issues related to her childhood abuse and her relationship with her mother;
>
> learning to cope with problems in an effective manner;
>
> learning how to get what she needs/wants without threatening or intimidating, but rather in a manner that is socially acceptable;
>
> plan an activity for each visit, yet allow the children to give direction for activities when together;
>
> demonstrate an ability to manage the children so there isn't chaos or potential for the children to be hurt, and the children will listen and comply with her direction at least 70% of the time each child has one-to-one contact with her;

be available for appointments for her children if they don't interfere with other scheduling;

maintain residence in the same location for four months;

not regularly depend on community resources for basic needs;

regularly meet with an approved mental health professional until discharged with worker approval.

The overall theme in the department's plan seems to be to help J.S. control her anger and learn alternative means of disciplining her children. J.S.'s husband was released in February 1987, and the case plan was amended to require his involvement. Beginning in June 1987, J.S. was required to utilize Jo Flaugh as a resource for parenting skills.

In each of the quarterly reports provided by Bethany Homes, the social worker recommended continued foster placement because J.S. had not attended all her appointments and steadfastly maintained she was not learning anything. The social workers continued to express concern about the mother's inability to control her anger and to appropriately respond to her children. This concern was based primarily on the mother's continual insistence she had the right to physically discipline her children. J.S.'s parental rights were terminated in August 1988.

II. Standard of Review.

Appellate review of the proceedings to terminate a parent-child relationship is de novo; thus, it is this court's duty to review the facts as well as the law and

adjudicate their rights anew. In Interest of Dameron, 306 N.W.2d 743, 745 (Iowa 1981). We accord weight to the fact findings of the juvenile court, especially when considering the credibility of the witnesses whom the court heard and observed firsthand, but we are not bound by these findings. Id.

Central to a determination of this nature are the best interests of the child. Id. In this connection we look to the child's long range as well as immediate interest. Id. Hence, we necessarily consider what the future likely holds for the child if returned to his or her parents. Id. Insight for this determination can be gained from evidence of the parent's past performance, for that performance may be indicative of the quality of the future care that parent is capable of providing. Id.

Termination was ordered in this case under Iowa Code section 232.116(1)(e) (1987). Under that statute, termination of parental rights may occur if:

> (1) The child has been adjudicated a child in need of assistance pursuant to section 232.96.
>
> (2) The custody of the child has been transferred from the child's parents for placement pursuant to section 232.102 for at least twelve of the last eighteen months.
>
> (3) There is clear and convincing evidence that the child cannot be returned to the custody of the child's parents as provided in section 232.102.

A child cannot be returned as provided in section 232.102 if upon return the child cannot be protected from some harm

which would justify adjudication of the child as a child in need of assistance. Iowa Code § 232.102(4)(b) (1987). There is a rebuttable presumption that the best interests of these children are served by custody of their natural parents. In Interest of Chad, 318 N.W.2d 213, 219 (Iowa 1982). Under the above statute, the State must rebut that presumption by clear and convincing evidence the children, if returned, could not be protected from the harm of, in this case, physical abuse. The children were removed from the home because J.S. physically abused her two older children. The issue question in this appeal is whether there is clear and convincing evidence the children are in danger of physical abuse if returned to their mother's custody.

The department set out a case plan for this family. This plan is essentially a set of hurdles the parent must negotiate in order to be entitled to the return of her children. When a parent fails to comply to the department's satisfaction, the department recommends continuing foster placement and, eventually, termination of parental rights. We first point out that the parent's failure to comply with the department's case plan cannot be considered grounds to terminate parental rights. The grounds we consider are statutory and set forth by the legislature, not the Department of Human Services. However, these case plans are carefully formulated for each

individual family to provide the services needed in order to correct the situation which warranted removal of the children. Thus, we consider compliance or failure to comply with the case plan only to the extent it sheds light on the probability of harm in returning children to their parent's custody. We consider compliance carefully, keeping in mind that the State has the superior ability to mount a case against the parent and even has the power to shape the historical events that form the basis of termination. Santosky v. Kramer, 455 U.S. 745, 763, 102 S. Ct. 1388, 1400, 71 L. Ed. 2d 599, 613 (1982).

IV. Clear and Convincing Evidence.

The department's recommendation for termination was based on J.S.'s lack of cooperation, denial of responsibility, and no indication of any significant change in her attitude toward the entire abusive situation, which led to their conclusion the risk of further abuse of the children remains high if they are returned to J.S.'s custody. We will now address whether the specific findings of the mother's failure to comply with the case plan constitute clear and convincing evidence her children cannot be returned to her custody.

A. Therapy. Following removal of the children, it was determined J.S. should participate in individual therapy with Ann Maxwell to work out her anger and resolve her own experience as an abused child. J.S.'s therapy with

Ms. Maxwell was wholly unsuccessful. Ms. Maxwell suggested to the department that J.S. might have a better rapport with another therapist, but J.S. was never reassigned. J.S.'s attendance at therapy as sporadic. Apparently J.S. had transportation problems and did not have a telephone to call and make appointments. J.S. saw Ms. Maxwell seven times between February 1987 and January 28, 1988. At that time Ms. Maxwell told J.S. she need only call for an appointment on an "as-needed" basis, giving J.S. the impression she was no longer required to attend. J.S. testified her social worker also told her she need no longer attend these sessions.

The mother's failure to comply with her obligation to participate in therapy was the result of two separate problems. First, she had no means of transportation other than walking or relying on family members to drive. In the winter of 1987, the mother made every effort to attend counseling, including walking to the Mental Health Center even though she had no winter coat. We do not fault J.S. for missing appointments due to lack of transportation or a telephone. However, we do think J.S. was under an obligation to point out to her social worker her situation and ask for assistance.

The second problem with regard to her failure to attend counseling was her conclusion that she was not accomplishing anything. Ann Maxwell did not directly

confront J.S. with the reason for the counseling (dealing with anger) and apparently gave J.S. no direction but to ask the same questions about her family of origin and whether she was having problems. We would require a parent to make a good faith effort to participate in services designed to help a parent regain custody. However, we would not put the burden on the parent to administer the service without direction from the professional.

B. **Supportive Services.** In June 1987, J.S. began meeting with Jo Flaugh for Homemaker/Family Life Services on a weekly basis. J.S. did not participate in these services from late July 1987 until November 1987 due to her work schedule. J.S. began participating again in November and December. Ms. Flaugh had heard J.S. would be gone from the area until after January 1, 1988, and therefore did not schedule any further appointments. J.S. was, in fact, present for visitation during that time. These services were discontinued in January 1988 due to the inconsistency of the appointments. J.S. had completed four out of the nine S.T.E.P. parenting classes.

Once again, the mother's failure to comply with the case plan with respect to these services was due to transportation and communication problems. In addition, J.S.'s employment interfered with her ability to make appointments. We do not consider this as evidence the children cannot safely be returned home.

C. Housing and Employment. J.S. lived in at least four different places between October 1986 and March 1987. Following her husband's release in March 1987, they took an apartment together. The apartment was well kept and adequately furnished. In mid-November 1987, her husband moved out and J.S. continued to reside there until February 1988. J.S. moved to the home of her minister and his wife from February 1988 until July 1988, when she moved back to her apartment.

J.S. worked as a day maid at a motel until shortly before her husband moved out. After their separation, J.S. received rent assistance and began working for Human Services.

The case plan required J.S. to maintain a suitable residence. With the exception of the first four months, J.S. did comply with this requirement. Ms. Flaugh testified J.S. was a skilled housekeeper. There is no evidence in this regard that the children would not be provided a suitable environment if returned to their mother's custody.

D. Visitation. Visitation initially was held at the department offices beginning October 31, 1986. Following visits were held weekly at Bethany Home and then at a park. Home visits were also held. The record is replete with evidence of the children's reactions to visits and to being returned to foster care following visits. We do not

set out these facts as they do not give any insight into whether or not the children can be returned to the home, but only demonstrate the stress children experience in this situation. We do note that the children did not express a fear of their mother nor a desire to discontinue visits.

J.S. was allowed to take the children for pizza during one visit. When the case worker arrived, the two older children were crying, saying their mother hit them. There is no evidence in the record whether this incident was abusive or whether the children were crying because they had been spanked for misbehavior.

During a visit at J.S.'s home, an incident occurred between J.S. and her daughter. The child was, as usual, reluctant to put her coat on. J.S. yelled at her daughter to do as she was told. When the girl did not comply, J.S. "raised her hand hitting" the girl along the buttocks and legs. When told by the case worker this extreme action was unwarranted, J.S. responded, "I'll do what I want with my kids; they're mine. I can hit them anytime I want. I do things my own way."

The social worker was concerned with J.S.'s failure to make all visits. The social worker also felt that J.S.'s explanations were insufficient and showed insensitivity to the children's needs. J.S. felt that telling her kids the truth as to her absences should be sufficient. Her missed visits were the result of transportation problems,

scheduled appointments which would end when visitation was to begin, and her inability to contact the social worker when she would be late.

While for the most part J.S. was fairly consistent in exercising visitation, between January and June 1988 she consistently missed visits. During the twenty months the children were in foster care, J.S. visited her children forty-eight times out of a possible eighty-six opportunities. However, J.S. testified that all the missed visits were the result of transportation or communication problems or of conflicts with work or class. Anytime J.S. was late, the visit would be canceled. J.S. pointed out that many missed visits were due to the fact her class ended or she got off work the same time the visitation was scheduled to begin. Thus, she would arrive late only to find the social worker had already left with her children. We find evidence in the record visitation usually went well and J.S. tried to exercise this right.

Our determination here does not center upon specific instances of the mother's failure to comply with the case plan. Instead, we consider the evidence that J.S. still displays a great deal of anger, that she continues to maintain she can discipline her children in the manner she sees fit, and the department's fear her anger will interfere with proper discipline.

Our first concern is with the evidence that during visitation J.S. continued to physically discipline her children. Our statute does not choose among differing philosophies of parenting. Instead, the statute points out several harms which justify removing children from their parents' custody, including physical and sexual abuse, abandonment, and failure to provide care. The department teaches Systematic Training for Effective Parenting, the S.T.E.P. system. The S.T.E.P. method teaches parents alternatives to physical discipline including using the "time-out" method. Our statute does not require parents to adopt this method as a prerequisite to keeping or regaining custody of their children. We do not and cannot say that physical discipline is not acceptable. What is not acceptable is physical discipline which rises to the level of abuse.

Clearly, J.S. abused her children in the course of administering physical discipline. The State relies on two incidents during visitation in which J.S. "hit" her children as a basis for showing the children are likely to be abused again if returned to her custody. There is no evidence of the nature of the incident at the pizza parlor. Therefore, we cannot consider whether it was abusive or probative of the issue. The second incident involved what could apparently be characterized as a slap to the bottom in response to the girl's misbehavior. The

social worker characterized that action as inappropriate and uncalled for. The social worker's conclusion cannot be the basis for a finding that the children are likely to be abused. What has occurred here is a dichotomy in the philosophy of the department versus the philosophy of the parent in administering discipline. Physical discipline is not per se abusive. What amounts to abuse must be evaluated on an individual basis.

The evidence is clear and convincing J.S. only uses physical force on the children as a method of discipline. It is also clear that she will continue to physically discipline her children if they are returned to her custody. We must determine if, from the record, there is clear and convincing evidence J.S. will resort to abusive discipline if the children are returned.

The social worker's concerns in this regard seem to be the result of the mother's expression of anger since their involvement with her family. The children were removed from the home with the assistance of the police, and J.S. spent that night in jail. J.S. was hostile to her case worker and threatened to burn her house down. J.S. enjoyed a good relationship with Jo Flaugh, but became hostile to her following the permanency hearing in February 1988 and wrote a hostile letter. Ann Maxwell characterized J.S. as a nice person, but stated she was not cooperative. The social workers also pointed out instances during supervised

visitation when they would make suggestions and J.S. would respond in anger. J.S.'s hostility has been toward the people who are involved in taking custody away. She has not been physically hostile to these people, only verbally.

We do not find clear and convincing evidence the children will be abused if returned to their mother's custody. We would point out that the clear and convincing standard requires a higher finding of probability than mere preponderance of the evidence. This higher standard is required because of the risk of error inherent in fact findings of this nature. Santosky v. Kramer, 455 U.S. at 757, 102 S. Ct. at 1396-97, 71 L. Ed. 2d at 609. The standard of proof is instructive of the degree of confidence the fact finder should have in the correctness of factual conclusions. Id. at n.9. Here there is no overwhelming evidence the children will be abused if returned to their mother's custody. The termination statute is designed to further the best interests of the child. We presume it is in children's best interests to be in their parents' custody. The State has not rebutted the presumption of custody by clear and convincing evidence, and therefore we find it is in the children's best interests that custody remain with their mother.

REVERSED.