

FILED

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

**IN THE INTEREST OF
M.S.H., JR., A Child,**

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Filed February 26, 1986

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5-670

**M.D.H., SR., Father,
Appellant.**

85-771

Appeal from the Iowa District Court for Pottawattamie County (No. 12-1165),
Gordon C. Abel, District Associate Judge.

The natural father of a child appeals from the juvenile court order terminating his parental rights. He challenges the sufficiency of the evidence to justify the termination. **AFFIRMED.**

Gary K. Anderson of Anderson & Wheeler, Council Bluffs, for
appellant-father.

Thomas J. Miller, Attorney General; Charles Phillips, Assistant Attorney
General; E. A. Westfall, Assistant Pottawattamie County Attorney, for the
appellee-State.

Heard by Oxberger, C.J., Donielson, and Snell, JJ.

The father's parental rights were terminated below by the trial court. He appeals, saying there was insufficient evidence to show that the child would be harmed if returned to him. We affirm.

The child, M.S.H., is a boy born in January 1976. The appellant was married to the mother of the child in 1975. He says his inability to provide for his wife and child was the reason he committed a robbery in 1977. He was sentenced to prison at the Nebraska State Penitentiary, where he now resides. In August 1977 the father was on a furlough when he escaped and committed another robbery. The father and mother left the child with friends, with directions they take the child to the maternal grandparents. M.S.H. was delivered by the friends to the grandparents. He has lived with the grandparents since that time. The child was adjudicated in need of assistance in December 1977, and placed in the custody of the grandparents. The appellant has since obtained a divorce from the mother. The mother's parental rights were terminated in December, 1981.

A petition was filed to terminate the father's parental rights and hearing was scheduled for August 9, 1984. The court postponed the hearing, granting a continuance on the condition the father make monthly child support payments of \$30, obtain a psychiatric evaluation, and have no contact with the child unless approved by a child psychologist. The father made one payment, and his parents made the remaining payments to the time of the termination hearing in January 1985. The appellant says Nebraska prison officials refused to cooperate in obtaining a psychiatric evaluation. He has not seen the child since 1977.

At the termination hearing, the father indicated he wanted to remain the father of the boy, but realized it was in the child's best interests that the child remain in the care of the grandparents. The appellant stated his desire in becoming involved in the child's life when the experts decide it would be in the child's best interests.

The appellant agrees that the first two parts of section 232.116(5) have been met; that the child has been adjudicated in need of assistance, and custody transferred from the parents for at least 12 months. He contends the last requirement of the Code has not been met, that harm will come to the child if returned to his father. Id. He says he has matured during his stay in prison, agreeing that in the past he lacked the emotional, mental, or physical ability to care for the child properly. Appellant contends he has shown his maturity in giving the child to friends when he escaped from prison in 1977. He says this shows his concern for the child. Further evidence that he has the child's best interests at heart includes his recognition that the child's physical care should be left with the grandparents. The father equates this case to that described at the Matter of Burney, 259 N.W.2d 322 (Iowa 1977). There, the court found the mother of the child had not abandoned her child by placing it with friends at a time when she could not care for the child. Id. at 324. Rather, the court stated, it showed her concern for the child. Id. She maintained contact with the child throughout the time he was placed with friends. Id. at 323. The appellant concludes that while he has shown bad judgment with his own life in the past, he has matured and has always had the child's best interests as his concern.

The State responds by indicating that the father's past actions, and his actions while imprisoned show he has not matured. The father has had at least four

convictions since his son's birth, including charges of burglary, larceny from a person, and escape and armed robbery. While in prison, he has faced disciplinary proceedings, and was dropped from the work release program in 1984 because of two major infractions. The appellant has lost 13 months good time because of his actions while in prison. The State argues that this activity combined with the convictions and past actions show the appellant's continuing involvement in a lifestyle harmful for the child.

The State says the appellant was also aware that in engaging in criminal activities, he was leaving the child with a mother he must have known would give the child substandard existence. The mother's problems, which existed before the child's birth, included alcohol and drug abuse. She was also a fugitive from justice.

The father has not seen the child since 1977. Since that time he has written the child one letter, made one child support payment, and in one instance asked the grandparents to bring the child to the prison. When the father was caring for the child while M.S.H. was an infant, the child suffered from severe diaper rash, displayed signs of developmental lag, and medical care was neglected. When the father saw the child in 1977 during his furlough and subsequent escape, the child was delivered to the grandparents underweight and improperly clothed. The grandparents also said that earlier the child was given to them on a November night to be cared for, dressed only in a diaper.

Psychotherapist Robert Wade testified that M.S.H. was having emotional difficulties and feared being removed from the grandparent's home. He could not even recommend visitation with the father, and instead recommended termination of parental rights.

Juvenile Court Officer Michael McCarty stated that if the child was returned to the father, the child might face emotional abuse, and that prolonging termination of parental rights would be to "risk—beyond what is reasonable or prudent—this young man's emotional and psychological health."

We find the State has proven by clear and convincing evidence that the child cannot be returned to the father without facing harm. Although the father emphasises he does not want custody, only visitation, the applicable statute requires a decision as to whether the child can be returned to the parent. Iowa Code § 232.116(5) (1985). The statute requires a determination of the child's status within a reasonable time after the child is removed from the parent's custody. As the psychologists and other professionals involved here stated, the child suffers from the tentative status in which he is placed. We affirm the trial court's decision.

AFFIRMED.