IN THE COURT OF APPEALS OF IOWA

No. 1-198 / 91-84

FILED
AUG 27 1991
CLERK SUPREME COURT

IN THE INTEREST OF J.H. and **A.H.**, Minor Children;

M.M.H., Father,

228

Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, James L. Locher, Juvenile Referee.

The father of two children appeals the termination of his parental rights. **AFFIRMED.**

Kyndra Walton of Brown, Kinsey & Funkhouser, Mason City, for appellant father.

Bonnie J. Campbell, Attorney General; Kathrine S. Miller-Todd, and John Parmenter, Assistant Attorneys General, for appellee State.

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

DONIELSON, J.

This case involves two children, a boy born in August 1986 and a girl born in November 1987. Their parents were married to each other when the children were born, but the marriage was dissolved in 1989.

The mother suffers from mental retardation which is a consequence of a 1985 motorcycle accident. She lacks the ability to learn and retain information, and she has demonstrated a pattern of poor judgment. A psychologist described her as very immature, self-centered, passive, dependent, impulsive, given to emotional outbursts, lacking in tolerance, lacking in insight or self-awareness, and unable to cope with stress. Witnesses agreed that she is barely able to care for herself, let alone the children. (The mother voluntarily consented to the termination of her parental rights and she has not appealed.)

In 1988 the father, M.H., was convicted of lascivious acts with a child and indecent contact with a child. The charges did not involve his own children, and there is no indication in the record that the father has sexually or physically abused them. He was jailed for six months on the indecent contact charge. On the lascivious acts charge, he was given a sentence of up to five years, but the sentence was suspended and he was placed on probation.

One condition of his probation required M.H. to complete sexual abuse/sexual addiction treatment. The father started attending a program called Parents United.

He was terminated from the program for lack of attendance but he was given a second chance. In January 1990 he was again terminated from the program due to dishonesty and non-cooperation. The failure to cooperate with the counseling program resulted in the revocation of the father's probation. He was incarcerated for a term not to exceed five years; he remained incarcerated at trial time.

M.H. provided some and perhaps primary care for his son during infancy. Apparently he performed these duties adequately. Shortly after his 1988 incarceration, the children were adjudicated to be children in need of assistance (CINA) and were placed in foster care in the home of their maternal grandmother. They have remained in the maternal grandmother's home continuously since that time.

During the children's foster care and when M.H. was not incarcerated, M.H. has exercised visitation less frequently than he was entitled--he visited the children once a month or once every other month. (All the visits were supervised and there has been no overnight visitation between the father and the children since the children were removed from the parental home.) M.H. attributes this partly to his reluctance to accept transportation services provided by the Department of Human Services. M.H. has not kept in touch with the children by letters or phone calls.

In July 1990 the State filed a petition to terminate the parental rights of both parents with respect to both

children. After a hearing, the juvenile court did terminate the parental rights of both parents. With respect to the father, the juvenile court relied on Iowa Code sections 232.116(1)(e) and 232.116(1)(g) (1989 Supp.). Those subsections permit termination if children cannot safely be returned to a parent's care, after a CINA adjudication and extended foster care. (The subsections differ primarily in the ages of the children to whom they apply.)

M.H. has appealed. The father challenges the sufficiency of the evidence to establish that the children cannot safely be returned to his care at some time in the future. He also alleges termination is not in the children's best interests; he contends that even if termination is otherwise warranted, it should be avoided under Iowa Code section 232.116(3)(c) due to the alleged closeness of the parent-child relationship.

Appellate review of termination proceedings is de novo. In re W.G., 349 N.W.2d 487, 491 (Iowa 1984), cert. denied, 469 U.S. 1222, 105 S. Ct. 1212, 84 L. Ed. 2d 353 (1985). We give weight to the findings of fact of the juvenile court, especially when considering the credibility of witnesses, but we are not bound by those determinations. Id. at 491-92.

M.H. concedes that the requirements for termination found in subsections 232.116(1)(e)(1)-(3) and (1)(g)(1)-(3) have been met (relating to the ages of the children, their

prior CINA adjudications, and the length of time the children have been transferred from the parents custody). Both subsections 232.116(1)(e)(4) and (1)(g)(4) require clear and convincing evidence that the children cannot safely be returned to the custody of the parents at the present time. M.H. can hardly argue that he is presently capable of receiving the children; he is incarcerated and *cannot provide* his children with a home. Returning the children to M.H.'s custody at the present time would necessarily result in the children again being adjudicated CINA. See § 232.2(6)(n) *(parent's imprisonment results in* the child not receiving adequate care). Therefore, the statutory requirements for termination have been met.

Nonetheless, M.H. argues that there is not clear and convincing evidence that the children cannot be returned to him at some point in the future. M.H. contends his term of imprisonment will conclude in September 1992 ("as long as I don't mess up"). He asks that the children remain in foster care until he is released and that he then be given an opportunity to demonstrate that he can responsibly parent his children. He assured the trial court that he had no intention of reoffending.

This court is unwilling to maintain the status quo for an additional one year plus. The H. children have been in foster care continuously since May 1988. M.H. was given an opportunity to avoid incarceration for his criminal convictions with a concomitant opportunity to continue

parenting his children. M.H. failed to fulfill the terms of his probation, even after being allowed a second chance with Parents United. His failure to adequately address his sexual abuse problem resulted in the forfeiture of his freedom from imprisonment and of his ability to provide a home for his children. Even while not incarcerated, M.H. failed to consistently visit his children.

Furthermore, there is no guarantee that M.H. will be capable of safely parenting his children upon completion of his sentence. M.H.'s history of cooperation with counseling is not encouraging. Until M.H. addresses his sexual abuse problem, his children are at risk of again being deprived of their parent due to further incarcerations. At the time of trial, these children had already waited over two years for their father to become a responsible parent. He asks that they continue to wait. These children should not be forced to endlessly await the maturity of their father. In re T.D.C., 336 N.W.2d 738, 744 (Iowa 1983).

There is clear and convincing evidence the children presently cannot be returned to the custody of their father. All statutory requirements for termination have been met.

These children need and deserve permanence. Termination of M.H.'s parental rights will allow the children the opportunity to experience a permanent home through adoption (which is likely). Contrary to M.H.'s

contention, the evidence does not clearly suggest that termination would be detrimental to the children due to the closeness of the parent-child relationship. Undoubtedly, the evidence establishes that J.H. recognizes his father and enjoys his infrequent visits. M.H.'s daughter was removed from the parental home when she was approximately five months old and M.H. admits he is not as close to her as he is to J.H. This record does not support M.H.'s contention of extreme closeness to his children within the contemplation of the Code. We find no extenuating circumstances contradicting the propriety of termination at this time. See § 232.116(3).

For all the foregoing reasons, we affirm the termination of M.H.'s parental rights.

AFFIRMED.