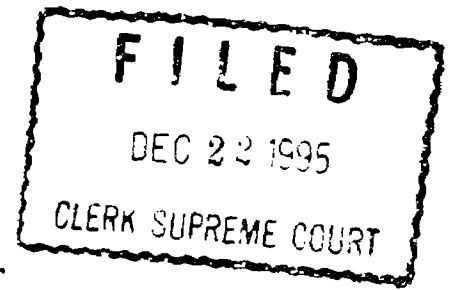


IN THE COURT OF APPEALS OF IOWA

No 5-690 / 95-1022



IN THE INTEREST OF C.C., M.C., and M.C., Minor Children.

**R.C., Father,**  
Appellant.

**S.C., Mother,**  
Appellant.

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Appeal from the Iowa District Court for Polk County, Karla J. Fultz, Associate Juvenile Court Judge.

Parents appeal the termination of their parental rights to their minor children.

**AFFIRMED.**

Matthew S. Sheeley of Parrish, Kruidenier, Moss, Dunn, Montgomery & Thomas, Des Moines, for appellant-father.

Frank Steinbach III of Cook, Gotsdiner, McEnroe & McCarthy, Des Moines, for appellant-mother.

Thomas P. Lenihan, West Des Moines, guardian ad litem for appellant-mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, John P. Sarcone, County Attorney, and Ray Blase, Assistant County Attorney, for appellee-State.

Mike Bandstra of Youth Law Center, and Christine Dykeman, legal intern, Des Moines, for appellees-minor children.

Considered by Hayden, P.J., and Sackett and Huitink, JJ.

**HAYDEN, P.J.**

R.C. and S.C. are the parents of C.C., born April 27, 1992; M.C., born December 2, 1989, and M.C., born January 5, 1988.

R.C. was arrested on July 1, 1993, on charges of sexually abusing several neighborhood children. There were allegations he involved M.C. and M.C. in the abuse. A no-contact order was entered prohibiting R.C. from contacting his children. The children were removed from S.C.'s custody -- with her consent -- on July 23, 1993, and initially placed in the custody of their maternal aunt.

A petition was filed alleging the children to be children in need of assistance (CINA) on July 21, 1993. On August 24, 1993, all three children were adjudicated CINA pursuant to Iowa Code section 232.2(6)(c) (parent fails to adequately supervise) and 232.2(6)(d) (child has been or is imminently likely to be sexually abused by parent). The children remained in their aunt's care until foster care placement was available.

The court ordered S.C. to participate in the Parent Infant Nurturing Center (PINC) program and ordered R.C. to complete a parenting evaluation. R.C. refused to comply with the parental evaluation during the pendency of the criminal charges. S.C. received supervised visitation, which was terminated by the department of human services when M.C. and M.C. disclosed she too had engaged in sexual activities with them. The juvenile court ordered no further visitation until such time as the children's and mother's counselors agreed.

Both M.C. and M.C. have discussed various sex games their parents have engaged in with them. Their descriptions of the abuse have been consistent and never recanted. One doctor, Ann Wellander, testified both boys continued to have great fear concerning contact with their parents. It was this doctor's opinion the children would suffer emotional harm if returned to the custody of either parent. She believed termination of the parental rights was in the best interests of the children.

In March 1994 R.C. plead guilty to two counts of third-degree sexual abuse, three counts of dissemination of obscene material to minors, and one count of indecent exposure. He was sentenced to a total term of incarceration not to exceed twenty-four years. He did not contact the department thereafter. R.C. participates in the sexual offenders' treatment program at the Mount Pleasant Correctional Facility. He has received no services from the DHS.

S.C. functions in the borderline intellectual range and suffers from developmental and mental disabilities. She has been a victim of severe sexual abuse by several persons. She denies she or R.C. have been sexually inappropriate with the children. S.C. rejected DHS's recommendation she reside in a group home. She has participated in PINC, a program specifically designed for the mentally retarded/developmentally disabled. She has also had a Generations' worker to assist her with housing and intakes for services, a payee to assist with budgeting, parenting education, a CASA worker to monitor the case, and individual therapy. S.C.'s

counselor testified there are more appropriate services for S.C.'s development and safety than those provided by DHS. The counselor, however, acknowledged S.C. is not, and will not be, capable of parenting these children alone.

A termination petition was filed. The children had been out of their parents' custody for more than one year at the time of the termination hearing. On the morning of the hearing, the children's attorney moved in limine, in light of the fact S.C. had both an attorney and a guardian ad litem, to have S.C.'s guardian ad litem's role limited to stating her position. The motion requested S.C.'s guardian ad litem not be allowed to call witnesses or cross-examine witnesses. The court granted the motion, concluding S.C.'s attorney would adequately represent her.

The juvenile court terminated both S.C.'s and R.C.'s parental rights. The court implicitly rejected R.C.'s claim the State failed to make reasonable efforts to reunite him with his children under the circumstances of his incarceration. The court specifically rejected S.C.'s claim the State had failed to make reasonable accommodations for her disabilities.

Both parents appeal.

### **I. Scope of Review.**

Appellate review of termination proceedings is de novo. *In re W.G.*, 349 N.W.2d 487, 491 (Iowa 1984) *cert. denied sub nom. J.G. v. Tauke*, 469 U.S. 1222 (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.

The primary concern in termination proceedings is the best interest of the child.

Iowa R. App. P. 14(f)(15). *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981)

We look to the child's long-range, as well as immediate, interests. We consider what the future holds for the child if returned to his or her parents. 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 the parent is capable of providing. Our statutory termination provisions are preventative as well as remedial. They are designed to prevent probable harm to a child.

*In re R.M.*, 431 N.W.2d 196, 199 (Iowa App. 1988) (citing *Dameron*, 306 N.W.2d at 745).

Iowa Code section 232.116(1)(e) (1991) permits the juvenile court to terminate the parent-child relationship if the court finds all of the following have occurred:

- (1) The child is four years of age or older.
- (2) The child has been adjudicated a child in need of assistance pursuant to section 232.96.
- (3) 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, or for the last twelve consecutive months and any trial period at home has been less than thirty days.
- (4) There is clear and convincing evidence that at the present time the child cannot be returned to the custody of the child's parents as provided in section 232.102.

Iowa Code section 232.116(1)(g) permits the juvenile court to terminate the parent-child relationship if the court finds all of the following have occurred:

- (1) The child is three years of age or younger;

- (2) The child has been adjudicated a child in need of assistance pursuant to section 232.96.
- (3) The child has been removed from the physical custody of the child's parents for at least six months of the last twelve months, or for the last six consecutive months and any trial period at home has been less than thirty days.
- (4) 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 at the present time.

## **II. Termination of R.C.'s Parental Rights.**

The primary concern in the termination of parental rights is the best interests of the children. *In re A.Y.H.*, 508 N.W.2d 92, 94 (Iowa App. 1993). These interests include the children's present physical, mental, and emotional interests, as well as their long-term interests. *Id.* We determine the three children cannot be returned to R.C.'s custody and termination is in the best interests of these children.

Evidence of a parent's past performance may be indicative of the quality of future care he or she is capable of providing. *Dameron*, 306 N.W.2d at 745. There is clear and convincing evidence R.C. perpetrated severe sexual abuse on his children. M.C. was able to demonstrate with the use of dolls the sexual abuse committed against him by his father. Additionally, both M.C. and M.C. talked about the sexual games they played with both of their parents. R.C., however, has refused to admit either he or S.C. sexually abused the children. Given R.C.'s refusal to admit to the sexual abuse, it is doubtful such abuse would cease if custody of the children was returned to him.

Clear and convincing evidence also indicates these children remain in extreme fear of R.C. Witnesses testified the children would have their foster parents check if the windows were locked so R.C. could not take them away. These children should be allowed to put their fears to rest. Clearly, termination of R.C.'s parental rights is in the children's best interests both mentally and emotionally.

R.C.'s release date from prison is February 11, 1999. According to the Iowa State Patrol, the earliest likely parole would be April 1997. These children should not be made to suffer indefinitely in parentless limbo. *Long v. Long*, 255 N.W.2d 140, 146 (Iowa 1977). Patience on behalf of the parent can quickly translate into intolerable hardship for the children. *In re R.J.*, 436 N.W.2d 630, 636 (Iowa 1989). As the trial court noted, these children deserve and need a permanent, stable home. They should not be forced to await such a home while their natural father spends time in prison. As such, termination of R.C.'s parental rights is in the long-term best interests of the children.

We determine termination of R.C.'s parental rights is in the best interests of these children.

### **III. R.C.'s Due Process Rights.**

R.C. contends his due process rights were violated because the State failed to offer services to him as an incarcerated parent. He claims he was denied the opportunity to be heard because caseworkers refused to offer services or develop a case

plan which would give him a chance to preserve his relationship with his children. The United States Supreme Court ruled the “reasonable efforts” requirement of 42 U.S.C. Section 671(a)(15) does not confer an enforceable private rights under 42 U.S.C. Section 1983, let alone a constitutional right to “reasonable efforts.” *Suter v. Artist M.*, 503 U.S. 347, 363, 112 S. Ct. 1360, 1370, 118 L. Ed. 2d 1, 15-16 (1992). We do not confer upon R.C. greater due process protections under the Iowa Constitution.

Due process requires “fundamental fairness” in judicial proceedings. *In re J.S.*, 470 N.W.2d 48, 52 (Iowa App. 1991). Where a parent receives notice of the petition and hearing, is represented by counsel, counsel is present at the termination hearing, and the parent has an opportunity to present testimony by deposition, we cannot say the parent has been deprived of due process. *Id.* As R.C. was not deprived of the above rights, we determine R.C. was not denied due process.

Furthermore, even if R.C. had a constitutional right to “reasonable efforts,” we find the State did make reasonable efforts to give services to R.C. At the beginning of the juvenile court proceedings, R.C. was ordered to complete a parenting evaluation. R.C., however, chose not to take this evaluation because of the risk of self-incrimination. Because a parenting evaluation was never obtained, it was difficult for the State to determine what services were appropriate for R.C.

Additionally, after R.C. was sent to Mount Pleasant, DHS attempted to gain information about the services R.C. was receiving at the institution from his attorney.

The attorney, however, was uncooperative and did not return phone calls. DHS also attempted to call the parole board to gain information about the types of services being offered to R.C. The parole board, however, stated such information was confidential. It is evidence DHS made many attempts to provide services to R.C. but were unable to gain the necessary information. Despite DHS's attempts to contact R.C., there is no evidence R.C. attempted to contact DHS after his incarceration. Neither R.C. nor his attorney made any inquiry about services.

DHS also has several legitimate reasons for not providing services to incarcerated people. First, agencies do not want to send their people into prison because of liability. Secondly, there is no need to duplicate services if they are already being provided by the prison system. Evidence indicates R.C. was receiving sex offender treatment in prison. There was no need for DHS to risk entering the prison in order to duplicate services. Furthermore, there was no evidence entered at trial indicating the father needed services other than sex offender treatment.

#### **IV. Termination of S.C.'s Parental Rights.**

We determine there is clear and convincing evidence these children cannot be returned to the care of their mother and termination is in the best interests of the children.

Evidence of past behavior provides insight as to the future care S.C. is capable of providing for the children. *In re L.L.*, 459 N.W.2d 489, 493-94 (Iowa 1990);

*Dameron*, 306 N.W.2d at 745. In this case, evidence shows S.C. perpetrated severe sexual abuse on these children and she has not protected the children from sexual abuse by their father, R.C. With regards to S.C., one psychologist, Dr. Michael McNeil, stated, "her need to be nurtured has apparently become quite sexualized, with the result that offers of affection and care in a sexual context would seem to be much more powerful motivators than any sort of goals offered by counselors or therapists." Despite consistent reports of abuse from the children, S.C. has denied either she or R.C. sexually abused their children.

Evidence also indicates S.C. trusts people very easily. She becomes sexually active with people without knowing anything about them. She allows people into her home and gives people keys to her home. S.C. has placed herself in a lot of dangerous situations and has been threatened in her home by a number of men. A DHS worker expressed concern about the children being at risk of further sexual abuse by S.C. and the men with whom she associates. McNeil expressed concern about S.C. choosing abusive men over the safety of her children. McNeil and Mr. Steve Feierstein, M.Ed., also stated S.C. was not yet able to protect herself or the children. Feierstein noted, "[S.C.] does not know how to differentiate between helpful and hurtful people due to her mental deficiencies."

Given these facts, we determine there is clear and convincing evidence the children cannot be returned to the custody of S.C. It is extremely likely the children

would suffer further abuse if returned to S.C. As such, the statutory grounds for termination under Iowa Code section 232.116(1)(e) and (g) are present. S.C., however, argues, even if the statutory grounds for termination are present, termination is not in the long-term best interests of the children. We disagree.

Evidence indicates S.C. will never be able to care for these children in a setting other than visitation. These children should not be forced to endlessly suffer “the parentless limbo” of foster care so S.C. can maintain visitation with them for her own benefit. *See Long*, 255 N.W.2d at 146. Children need not endlessly await the maturity of their natural parents. *In re T.C.D.*, 336 N.W.2d 738, 744 (Iowa 1983). “The crucial days of childhood cannot be suspended while parents experiment with ways to face up to their own problems.” *In re A.C.*, 415 N.W.2d 609, 613 (Iowa 1987). “Children simply cannot wait for responsible parenting. Parenting cannot be turned off and on like a spigot. It must be constant, responsible, and reliable.” *In re L.L.*, 459 N.W.2d at 495. To continue to keep these children in temporary foster homes is not in their best interests. *See In re J.L.P.*, 449 N.W.2d 349, 353 (Iowa 1989).

#### **V. Adequacy of Services Provided to S.C.**

Iowa Code section 232.102(5)(b)(1993) requires reasonable efforts be made to reunite a family. *In re L.M.W.*, 518 N.W.2d 804 (Iowa App. 1994); *In re A.L.*, 492 N.W.2d 198, 201 (Iowa App. 1992). When the State fails to make reasonable efforts to reunite the family, reversal of the lower court determination to terminate parental

rights is warranted. *In re J.P.*, 499 N.W.2d 334 (Iowa App. 1993). S.C. contends the State did not make reasonable efforts because it did not make reasonable accommodations to meet S.C.'s special needs. We determine there is clear and convincing evidence DHS made reasonable efforts towards reunification and provided adequate services to S.C.

S.C. was offered many services by the DHS in an effort to reunify the family. Many of these services were geared towards low functioning individuals such as S.C. DHS made several attempts to have S.C. participate in individual counseling through Polk County Mental Health. S.C., however, refused these services. S.C. was offered specialized services through the Parent Infant Nurturing Center (PINC) program which was designed for the mentally retarded/developmentally disabled. S.C., however, failed to complete the in-home visitation portion of this program and attempted to cut short every visit with her children. S.C. was offered vocational rehabilitation and a group home or independent living, but she refused assistance. S.C. was also offered services with IFSAP, but S.C. was uncooperative.

Other services offered to S.C. included: Family Preservation Program; child protective treatment services; a Generations worker to assist with housing and intakes for services; a CFI payee to assist with budgeting; a case work social worker from Adult Mental Health Services; Parent Growth to improve parenting skills; CASA to

monitor the case and assist in following through with services; and, therapy at BMC with Toni Bell to work through issues of sex abuse as both a victim and perpetrator

Despite these services, S.C. was resistant to many services and failed to make any significant progress in improving her parental skills. We determine the State did make reasonable efforts towards reunification and also provided S.C. with adequate services. Furthermore, the State did not fail to provide reasonable accommodations for S.C.'s disability as it provided many services geared towards persons with S.C.'s disabilities.

#### **VI. Disability Discrimination.**

The ADA prohibits a public entity from discriminating against a disabled person by excluding her from participation or by denying the benefits of public services, programs, or activities. *In re C.M.*, 526 N.W.2d 562, 566 (Iowa App. 1994) (citing 42 U.S.C. section 12132 (1993)). The ADA requires the public entity to make "reasonable accommodation" to allow the disabled person to receive the services or participate in the public entity's programs. *Id.* (citing 28 C.R.F. section 35.130(b)(7) (1994)).

S.C. argues she was discriminated against because of her developmental and mental **disabilities**. S.C. claims DHS failed to make reasonable accommodation in the delivery of services. She further claims she was denied visitation privileges because of her disability and, after her visitation privileges were denied, visitation could never be restored because of her disability. We determine S.C. was not discriminated against on

the basis of her disability and DHS made reasonable accommodations to allow S.C. to receive and participate in services.

There is no evidence in the record indicating S.C. was denied certain services because of her disability. As indicated in Division V. of this opinion, DHS offered S.C. numerous services geared towards mentally disabled persons. S.C., however, was uncooperative with services and did not make progress toward improving her parenting skills. Considering the long list of services offered, we find no evidence DHS denied S.C. services because of her mental disability.

There is also no evidence in the record indicating S.C. was denied visitation with her children because of her disability. After the children were found to be CINA, S.C. was given supervised visitation with the children. S.C.'s visitation rights were not suspended until after DHS discovered S.C. had sexually abused the children. Obviously, suspension of S.C.'s visitation privileges was due to the sexual abuse she perpetrated against the children, not her mental disability. After visitation was suspended, the court did not rule out future visitation stating, "[V]isitation may take place at the discretion of the therapists for the children and the mother, in a therapeutic setting at such time as the therapists believe it to be in the best interests of the children." Clearly, S.C.'s mental condition was not the reason for suspension of her visitation privileges, and restoration of such privileges was not denied because of her disability.

Furthermore, there is no evidence S.C.'s parental rights were improperly terminated merely because of her mental disability. While mental disability, standing alone, is not sufficient reason for termination of the parent/child relationship, it is a contributing factor to the inability to perform the duties of a parent. *In re J.W.D.*, 456 N.W.2d 214, 218 (Iowa 1990); *In re T.O.*, 470 N.W.2d 8, 11 (Iowa 1991).

[The mother's] mental disability is a proper factor for this court to consider in determining whether these children have been, and will be, neglected to the point where their interest and welfare required termination . . . . [T]ermination [is] appropriate when the disabled parent lacks the capacity to meet the child's present needs as well as the capacity to adapt to the child's future needs. Further, Iowa Code section 232.116(2)(a) states that in considering a termination of parental rights such consideration may include whether the parent's ability to provide for the child's needs is affected by the parent's mental capacity or mental condition.

*In re T.O.*, 470 N.W.2d at 11.

S.C.'s mental condition was not the only basis upon which the juvenile court terminated her parental rights. Termination of S.C.'s parental rights was based upon S.C.'s sexual abuse of the children, S.C.'s inability to protect the children from the sexual abuse of others, S.C.'s failure to admit she and R.C. sexually abused the children, S.C.'s failure to cooperate with services, S.C.'s failure to improve her parenting skills, and the best interests of the children. Termination of her parental rights was not based on her mental disability alone.

We determine S.C. was not discriminated against on the basis of her disability and DHS provided reasonable accommodations to allow S.C. to receive and participate in services.

#### **VII. Preclusion of Guardian Ad Litem from the Trial Process.**

S.C. also argues the trial court improperly precluded the guardian ad litem from participating in the trial process. We agree the guardian ad litem should not have been prevented from participating in the trial. Nevertheless, given the overwhelming evidence in support of termination, including the sexual abuse perpetrated by S.C. and the children's placement for adoption, we are compelled to affirm. The mother has not shown prejudice occurred because of the preclusion of the guardian ad litem from the trial process. It was in the best interests of the children to terminate S.C.'s parental rights.

#### **VIII. Improper Procedures.**

S.C. argues the juvenile court did not follow proper procedure because it failed to make its own independent "findings of facts," "conclusions of law," and "judgment." We agree. A court trying an issue of fact without a jury, whether by equitable or ordinary proceedings, must find the facts in writing, separately stating its conclusions of law, and direct an appropriate judgment. *In re A.M.H.*, 516 N.W.2d 867, 872 (Iowa 1994). Where juvenile orders do not contain written findings and statements as required by statute, procedural due process rights are implicated. *Id.* Nonetheless, our

de novo review of the case, as set out above, requires we affirm the judgment of the juvenile court.

**AFFIRMED.**