

FILED

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA**IN THE INTEREST OF T.D.C.,
A Child**

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Filed February 23, 1983

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T.C., Natural Mother,

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2-4053-68400**Appellant.**

Appeal from Cerro Gordo District Court, L. L. Boomhower, District
Associate Judge.

The natural mother of a five-year-old girl appeals from the trial court order terminating her parental rights. The mother contends the State failed to present clear and convincing evidence to justify termination. **REVERSED AND REMANDED WITH INSTRUCTIONS.**

Patricia R. LaPointe, Legal Services Corp. of Iowa, for appellant, natural mother.

Thomas J. Miller, Attorney General, and Brent D. Hege, Assistant Attorney General, for appellee.

Heard en banc.

OXBERGER, C.J.

The natural mother of a five-year-old girl appeals from the trial court order terminating her parental rights. The mother contends the State failed to present clear and convincing evidence to justify termination. We reverse and remand.

The child in question, a girl born in September 1976, was adjudicated to be a child in need of assistance in January 1978. Prior to that time the child had been placed in foster care because of the mother's arrest for falsifying a financial instrument. The child has been in foster care continuously since that time. (The child's natural father has never been involved in the child's life.)

The mother was convicted of falsifying a financial instrument. She spent about three years in custody, alternately in the Women's Reformatory and in a series of halfway houses. During her incarceration her daughter visited her in person and by telephone as permitted by penal authorities. She sent the child gifts and cards from time to time.

During her foster care, the child has been treated for emotional disturbances allegedly stemming from neglect and deprivation while she was in her mother's custody during the first year of her life. There was testimony suggesting that the child's symptoms were aggravated by visits from her mother.

The mother was released from penal custody in February 1982. At about the same time, the State filed the present petition to terminate the mother's parental rights on the ground stated in Iowa Code section 232.116(5). That statute provides that parental rights may be terminated if the court finds that:

- a. The child has been adjudicated a child in need of assistance pursuant to section 232.96; and
- b. The custody of the child has been transferred from his or her parents for placement pursuant to section 232.102 for at least twelve months; and
- c. There is clear and convincing evidence that the child cannot be returned to the custody of his or her parents as provided in section 232.102.

The trial court terminated the mother's parental rights as requested by the State. The mother has appealed, challenging the sufficiency of the evidence to support termination under the statutory ground quoted above.

I. Standard of Review

Our review of the trial court's findings in cases regarding termination of parental rights is de novo. Iowa R. App. P. 4; In Interest of Voeltz, 271 N.W.2d 719, 722 (Iowa 1978). Although we give weight to the trial court's findings, we are not bound by them. Id. The State has the burden of producing clear and convincing evidence that the child cannot be returned to the custody of its natural parent. In Interest of Adkins, 298 N.W.2d 273 (Iowa 1980); In Interest of Dameron, 306 N.W.2d 743 (Iowa 1981); In Interest of Chad, 318 N.W.2d 213 (Iowa 1982).

II. Sufficiency of the Evidence

Because of the mother's incarceration, her contacts with the child have been seriously curtailed. The child has been in foster care for four years, and there is evidence that during that period she has done reasonably well.

On several occasions, the mother failed to show up for visits with her daughter or arrived late. In reaching its decision to terminate, the court cited the recommendation of a social worker, who stated that the child has been in limbo, had emotional difficulties, and needed a stable home. In addition, the court relied upon the opinion of a psychiatrist, who noted that the daughter was having nightmares, was prone to serious emotional outbursts, and tended to defecate in her pants prior to and following her visits with her mother. The psychiatrist also testified that the daughter felt abandoned and unprotected and that she felt threatened by women. In addition, she had nightmares following these visits, was frightened, and would hide in closets and wet her bed.

Although the mother attempted to communicate with the daughter by long-distance telephone at least once a week, the child seemed to be uninterested and inattentive during those telephone conversations.

During her release from the reformatory the mother had several jobs, but was fired from two of them. Her third job seemed to go very successfully, and her employer has stated unequivocally that he would be happy to have her back on the job.

She ran up heavy debts during her release time, but began to repay the debts from her earnings. Most of a \$27,000 inheritance is gone, her only asset being a van that is worth about \$6,000. She claims that she spent a considerable amount of money on attorney fees in connection with her criminal trial and that another substantial amount was spent on a downpayment for a trailer, which she lost when she was unable to continue payments.

The court concluded that she had demonstrated her inability to manage money and to maintain stable employment, that she was incapable of understanding her daughter's needs and lacked the necessary parenting skills.

As we read the record, the following facts emerge: The mother is deeply devoted to her daughter. Throughout her incarceration, she made regular efforts to keep in touch with her child. The child, who was an infant when her separation from her mother began, did not know how to use the telephone and, like many children, was easily distracted during these weekly conversations by other events that were taking place around her, including favorite television programs. The mother has evidently devoted considerable effort to making or purchasing dolls and other toys which she would give to her daughter at every opportunity. Despite the extremely difficult circumstances in which she found herself, she made every effort to visit her daughter at every opportunity. Difficult transportation

problems and demands of her employers sometimes made it difficult for her to keep her visitation appointments precisely as scheduled. Despite her obvious desire to spend time with her daughter, she put the child's interests above her own when the child needed hospitalization or other treatment, and even put the concerns of the foster parents above her own when she granted permission for them to take the child out of state during a time when she might have been able to visit her so that they might attend the funeral of a deceased relative.

All of the parties agree that this child needs a stable home environment. Testimony of the psychiatrist and the social workers, as well as others familiar with the facts, demonstrate that this little girl is very disturbed by the present situation, in which she finds herself bounced back and forth between her natural mother and her foster parents. We fully agree with the assessment of the experts who testified in the case that she must know who her mother is, and not be torn by conflicting loyalties to two mothers. However, we are not convinced that the behavioral and psychological difficulties she is experiencing result from her contacts with her natural mother. It is quite clear that they result from the conflict that inevitably arises in her mind when she must leave the home in which she has been living to visit her real mother, and then must leave her mother again in order to return to the other home. The question, then, is simply whether this child's best interests lie in a return to the custody of her natural mother or the termination of the mother's parental rights and permanent custody in some other person or persons.

The recommendation of one of the social workers was based in part upon her evaluation of the mother's failure to meet her visitation schedule on certain occasions. The social worker said: "She indicated that she was having a hard time with her working and scheduling her hours that she was working. I indicated that I could appreciate that was a priority, but I felt that the child should be more of a

priority and that it was important to have these visits and reminded her of the contract." The social worker seems to have overlooked the fact that the mother was required, by the terms of her contract, to maintain her employment, and that the conflict set upon her by her employer's schedule for her work and the visitation schedule might have been impossible for her to reconcile.

The social worker based her conclusion that the mother was unwilling to provide a home for her daughter on the following reasoning:

A. I base that on the knowledge that she's unwilling to provide this home for her child because she's unwilling to do what is expected of her to successfully complete her program when she was at the reformatory and when she was at the halfway houses. Had she successfully completed these programs years ago, she could have provided a home for her child, had she originally made restitution as she was supposed to have done she could have provided a home for her child then.

I see her actions, which have caused her to continue to be incarcerated, have made her unwilling to provide a home for her child.

Q. So it all comes back to this restitution, is that true? A. I think it all comes back to she didn't obey the rules of society to begin with and that is why she got into trouble.

Thus, her conclusion is that the mother is to be punished for her criminal offense, not only by having to serve time in the reformatory, but also by being deprived of custody of her daughter. This is a conclusion that is not countenanced by law, and this testimony suggests that the social worker was basing her recommendations upon considerations that are outside the proper scope of this inquiry.

To sum up: We find that the record does not disclose clear and convincing evidencethat the mother is unfit or that the interests of this child would not be well served by returning her to her natural mother. We find that the behavioral problems which afflict this child are not attributable to her relationship with her mother, or to anything that her mother has done or failed to do, but are a result of

the instability inherent in her being shunted back and forth between two households. Nor do we find any convincing evidence that the mother is incapable of or unwilling to provide a suitable home for this little girl. On the contrary, it is evident that she is deeply attached to her daughter, and has attempted, through extremely adverse circumstances, to maintain a meaningful relationship with her.

The State has failed to meet its burden. This young woman and her daughter ought to be reunited. We therefore reverse and remand with instructions that the court issue appropriate orders for custody of the child to be returned to the mother under the supervision and with the assistance of the Department of Social Services.

REVERSED AND REMANDED.

All judges concur except Donielson and Johnson, JJ.

DONIELSON, J. (dissenting)

I respectfully dissent.

After carefully reviewing the record, I am convinced that there is clear and convincing evidence to justify termination of T.C.'s parental rights. In making the determination of whether parental rights should be terminated, we review the record in light of the well-established principles set forth in the Dameron case:

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

This court has often recognized that there exists a parental interest in the integrity of the family unit; nonetheless we also are cognizant that this interest is not absolute, but that it may be forfeited by certain parental conduct. [citations] Because the State as parens patriae, has the duty to assure that every child within its borders receives proper care and treatment, it must intercede when parents abdicate that responsibility. [citations]

Furthermore, it is our view that the current statutory termination provisions applicable here, like those they replace, are preventive as well as remedial. The provisions therefore mandate action to prevent probable harm to a child and do not require delay until harm has occurred. [citations]

Finally, as previously noted, the grounds alleged here for the termination of parental rights must by statute be proven by clear and convincing evidence. [citations]

Dameron, 306 N.W.2d at 745 (emphasis added).

The child was placed in foster care when she was only one year old after her mother was convicted of falsifying a financial instrument. Her foster parent testified that when she arrived, T.D.C. was very anemic, still had an ear infection which had been diagnosed six months previously, and was very unresponsive when spoken to, as if she didn't know her own name. The care T.D.C. received in her

first year contributed to her emotional instability. Indeed, Dr. Larson testified that this, along with the subsequent contact with T.C., caused T.D.C. to suffer severe emotional disturbance. When tested, T.D.C. demonstrated very aggressive and hostile feelings, and uneven intellectual and social development. The problems T.D.C. experienced were multiplied after her mother visited. As the majority noted, after these visits T.D.C. was withdrawn, was frightened, would hide in the closets, would wet the bed, and would exhibit flu symptoms and diarrhea. On the advice of psychiatrist, Dr. Larson, T.D.C. was admitted to a mental hospital for testing. Dr. Larson concluded that T.D.C. required a secure, stable environment to a much greater extent than a normal five-year-old child.

While I recognize that the recommendations of experts are not binding on this court, see In re Interest of Osborn, 220 N.W.2d 632, 633-34 (Iowa 1974), they do deserve some weight. This is especially true where, as here, there is substantial evidence supporting their recommendations. Here the social workers and doctors involved recommended termination of T.C.'s parental rights because of her inability to meet the special needs of T.D.C. The majority notes that T.D.C. has special behavioral and psychological problems, but asserts that these are not a result of her contacts with T.C., but are due to being shifted back and forth between T.C. and the foster parents. I do not believe the record supports this conclusion.

The child has special needs which T.C. obviously does not recognize and which she has demonstrated an inability to meet. After T.C. was released from the reformatory, she experienced unsuccessful attempts to live in half-way houses. There is evidence that, during these periods, T.C. was using controlled substances and was unable to maintain steady employment. She has been unable to establish a stable environment which would be appropriate for T.D.C. At the time of the hearing T.C. planned to live with a man and one other couple. She has

also demonstrated an inability to manage money; of her \$28,000 inheritance, none was reserved for the care of T.D.C. I believe T.C.'s past performance is indicative of the future care T.D.C. would receive if returned to her mother. As previously noted, we are to prevent probable harm to the child and need not wait until the harm has occurred before taking appropriate action. Here the expert testimony indicates that the child has already suffered harm from her early years of instability. Her needs dictate special care and a home environment which T.C. has demonstrated an inability to provide. On these facts, I agree with the trial court that there is sufficient clear and convincing evidence that T.C.'s parental rights be terminated. Accordingly, I dissent from the majority opinion.

Johnson, J., joins in this dissent.