

IN THE COURT OF APPEALS OF IOWA

No. 1999-65 (9-220) / 98-1478

**IN THE INTEREST OF M.A.S., H.L.S., T.M.S.,
and A.A.S., Minor Children,**

**M.E.S., Father,
Appellant.**

FILED

APR 30 1999

Appeal from the Iowa District Court for Clarke County, James W. Brown,
Judge.

The father of four minor children appeals a district court order terminating his
parental rights. **AFFIRMED IN PART; REVERSED IN PART.**

James A. Benzoni of Benzoni Law Office, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Gordon E. Allen, Deputy Attorney
General, and John D. Lloyd, County Attorney, for appellee State.

Monty W. Franklin, Humeston, guardian ad litem for minor children.

Considered by Huitink, P.J., Mahan, J., and Habhab*, S.J.

* Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

HABHAB, S.J.

Mark, the father of four minor children, appeals a district court order terminating his parental rights. He argues (1) the district court erred in terminating his parental rights because of the closeness of the parent-child relationship, (2) it would be in the children's best interest that they be kept together as a family unit, and (3) if the appellate court determines that termination is appropriate, then his parental rights should be terminated only as to the three youngest children. We affirm as to the youngest children and reverse as to the oldest child.

Mark and Brenda are the parents of four minor children, Teresa, born November 1982, Heather, born October 1985, Ashley, born September 1987, and Mark Allan, born November 1990. Teresa was adjudicated in need of assistance in October 1996 and the other three children were adjudicated in December 1996 after the children repeatedly witnessed their father abuse their mother physically and emotionally. The district court also entered a no-contact order against Mark Sr. in early December 1996. Mark Sr. has had no contact with the children since that time, except for one clandestine visit in late December 1996 and a few letters. He currently is in prison serving time on convictions for willful injury and third-degree burglary. He is eligible for parole in May 1999, but does not expect to be released for at least one to two years after that. Although Brenda retained custody of the three younger children initially, they were removed after Mark violated the no-contact order. After their emergency removal from Brenda's custody, Heather and Ashley were placed with their maternal grandparents and Mark, Jr. was placed in foster care. Heather and

Ashley were placed in foster care when their grandfather became ill and remain in foster care.

In February 1998, the State filed petitions to terminate Mark's parental rights to all four children. At trial, Mark argued he still had a close bond with the children, and that it was not in their best interests to be split up among foster homes. He maintained he requested enrollment in all classes necessary to enable him to ultimately regain custody, but admitted he was still on the waiting list at the time of trial. The eldest daughter, Teresa, testified that she did not want her father's parental rights terminated and she thought the younger children felt the same. She said she realized he had not been a good role model for them and had significant problems to overcome. Given the fact her father may not be released from prison for several more years, Teresa admitted it was not fair to the other children to have to wait for him to gain the necessary skills to obtain custody. The court concluded it was in the children's best interests that Mark's parental rights be terminated.

Mark does not challenge any of the grounds for termination. Rather, he claims the court erred in its exercise of discretion under Iowa Code section 232.116(3).¹ Mark argues he has asked to enroll in numerous classes to help him regain control of

¹ Section 232.116(3) reads, in pertinent part:

3. The court need not terminate the relationship between the parent and child if the court finds any of the following:

* * *

b. The child is over ten years of age and objects to the termination.

c. There is clear and convincing evidence that the termination would be detrimental to the child at the time due to the closeness of the parent-child relationship.

his life and his family. He asserts the children should remain as a family unit and not be divided among foster families. Mark also argues that even if the court concluded termination is in the children's best interest, the court should maintain his parental rights to Teresa, given her stated wishes at trial and her level of intelligence and maturity.

Our primary concern in a termination proceeding is the best interests of the child. *In re R.R.K.*, 544 N.W.2d 274, 275 (Iowa App. 1995). Those best interests are determined by looking at the child's long-range as well as immediate interests. Insight for that determination may be gained from evidence of the parent's past performance, for that performance may be indicative of the quality of the future care that the parent is capable of providing. *In re L.L.*, 459 N.W.2d 489, 493 (Iowa 1990); *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981); *In re T.T.*, 541 N.W.2d 552, 555 (Iowa App. 1995). Case history records are entitled to much probative force when a parent's record is being examined. *In re S.N.*, 500 N.W.2d 32, 34 (Iowa 1993).

We note the record in this case is devoid of case history records. There is no case permanency plan, no evaluations of the children or the parents, no record of any planned or proffered services designed to reunite the family. The CINA adjudication was based on the domestic abuse of Brenda by Mark. No one claims any harm to the children other than witnessing domestic abuse. The record does not reveal any further interaction between DHS and Mark except to petition to terminate his parental rights. Mark, however, does not raise any procedural claims and we do not address claims not preserved for review.

The termination statutes are preventative as well as remedial. *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981). The requirement of Iowa Code section 232.116(1)(e)(4) is met when the child cannot be returned to the parent because the definitional grounds of a child in need of assistance under section 232.2(6) exist. *In re A.M.S.*, 419 N.W.2d 723, 725 (Iowa 1988); *In re R.R.K.*, 544 N.W.2d 274, 277 (Iowa App. 1995). "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). At some point, the rights and needs of the child rise above the rights and needs of the parents. *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa App. 1997). Incarceration cannot serve as an excuse for conduct. *In re J.L.W.*, 523 N.W.2d 622, 624 (Iowa App. 1994). The general rule is unavailability to parent as a result of being incarcerated is no excuse. *In re R.L.F.*, 437 N.W.2d 599, 602 (Iowa App. 1989). An incarcerated parent must take full responsibility for the conduct which has resulted in confinement. *See In re J.S.*, 470 N.W.2d 48, 51 (Iowa App. 1991). It is unnecessary to take from the children's future any more than is demanded by statute. *In re A.C.*, 415 N.W.2d 609, 613-14 (Iowa 1987). Stated otherwise, plans which extend the twelve-month period during which parents attempt to become adequate in parenting skills should be viewed with a sense of urgency. *Id.* Of course some suggested extensions may prove to be appropriate. The judge considering them should however constantly bear in mind that, if the plan fails, all extended time must be subtracted from an already shortened life for the children in a better home. *Id.* at 614.

Mark claims he and the children have such a close bond that breaking it would be detrimental to the children. The only evidence he offers is Teresa's testimony the children still love their father and she objects to the termination. Teresa demonstrated her intelligence and maturity by acknowledging it would not be good for the younger children to wait possibly several years for the possibility of being united with their father. She objects to the termination and Iowa Code section 232.116(3) gives the court discretion not to terminate in these circumstances. By the time Mark expects to be released, Teresa could be an adult. (She'll be 18 in November 1999). Given her age and maturity, her expressed desire to maintain the parent-child relationship, and the lack of any real benefit to be realized by terminating the relationship at this point, we conclude the court abused its discretion in not refusing to terminate Mark's parental rights to Teresa. We reverse the court's decision as to Teresa.

Concerning the younger three children, continuing their placement in foster care on the chance Mark will have changed enough by the time he is released that he can resume their care is not in their best interest. They have been out of his care for over two years with no reasonable prospect of being returned to him for some time, if ever. The court properly exercised its discretion in terminating Mark's parental rights to Heather, Ashley, and Mark, Jr.

Mark raises the claim termination was improper because it would separate the

children. This claim is without merit. The children are, and have been separated since Teresa's adjudication in October 1996. Reversing the termination would not reunite the children.

AFFIRMED IN PART; REVERSED IN PART.

No. 98-1478. [1999-65 (9-220)] IN RE M.A.S., H.L.S., T.M.S., and A.A.S

Appeal from the Iowa District Court for Clarke County, James W. Brown, Judge. **AFFIRMED IN PART; REVERSED IN PART.** Considered by Huitink, P.J., Mahan, J., and Habhab, S.J. (7 pages \$2.80)

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