

IN THE COURT OF APPEALS OF IOWA

No. 3-571 / 93-992

FILED

DEC 29 1993

CLERK SUPREME COURT

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

STATE OF IOWA, D.M. Jr., and C.M.,
Appellants.

Appeal from the Iowa District Court for Polk County,
George W. Bergeson, Judge.

The State and guardian ad litem appeal from an order refusing to terminate parental rights, contending there was clear and convincing evidence to support termination under Iowa Code sections 232.116(1)(b) and 232.116(1)(e) (1993).

AFFIRMED.

Bonnie J. Campbell, Attorney General, John M. Parmeter, Special Assistant Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, and Ralph Moraso, Assistant County Attorney, for appellant-State.

Cory McClure, Youth Law Center, guardian ad litem and attorney for appellant-minor children.

Robert Tucker, Des Moines, for appellee-mother.

Donna R. Beary, Des Moines, for father.

Heard by Hayden, P.J., and Sackett, J., and Peterson, S.J.*, but decided en banc.

*Senior judge from the 1st Judicial District serving on this court by order of the Iowa Supreme Court.

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SACKETT, J.

In this case for termination of parental rights, the State and guardian ad litem appeal from an order finding there was not clear and convincing evidence supporting the State's petition to terminate the parental rights of a mother to her eight-year-old daughter and her seven-year-old son. We affirm.

Cathy¹ and David² were put in emergency foster care on March 7, 1992. The children at the time were living with their mother at the New Direction Shelter. The mother had an arrangement for a resident to watch the children. The mother left the shelter about 6:45 p.m. on March 6, and said she would be back by 10 p.m. that evening. The next day when she had not returned and could not be located, the children were placed in foster care where they remain today.

The removal was affirmed in a subsequent hearing. The mother did not strongly resist the placement. She claimed at the time to suffer blackouts. The mother had, in December of the prior year, been the unfortunate victim of a crime. She was stabbed sixteen times and left for dead on a Des Moines street. The incident caused her mental as well as physical pain. She was hospitalized for one month

1. Cathy is not the child's given name. Her initials are C.M.

2. David is not the child's given name. His initials are D.M.

for the physical injuries and one month for mental treatment. Her attackers were two men. She testified against them, but claimed she had serious apprehension about being in the Des Moines area because of the incident.

After the children were removed, some services were offered. There were general findings that reasonable services had been offered to keep the family together, but no specific findings were made as to the services offered. The mother sought treatment but did not follow through with programs. In May 1992, she checked herself out of a program in Iowa City and essentially disappeared. She missed subsequent hearings and a termination petition was filed in April 1993. A diligent search was made for the mother. A letter was sent to her father and on May 24, 1993, she contacted a juvenile court officer. She gave little explanation for her absence.

The termination hearing was held on June 10. The mother and the father testified. The father at the time was incarcerated at Mount Pleasant Correctional Facility and expected release in September or October. He, too, has limited or no contact with the children since their removal.

The mother testified she lived in Denver, Colorado, for the past year and had been at a Des Moines address for a week. She said she lived with her fiance and his friend.

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She said she left the area because one of her attackers had been released and she was frightened. The mother admitted she had suffered problems with abuse of alcohol and drugs and did not complete two treatment programs, and she did not attend counseling or maintain contact with her children. She recognized her children had suffered. She claimed to have ceased using drugs, but continued to drink beer.

The State claims it has shown "abandonment of a child" as defined under Iowa Code section 232.116(1)(b)(1991). The State contends the mother's minimal contact with the children during their 14 months in foster care is clear and convincing evidence to support a finding the mother abandoned the children. The State correctly relates the facts that on May 29, 1992, the mother left the Iowa City inpatient treatment program; in November, 1992, she left a message with an Iowa caseworker that she was in Colorado; and she did not again contact caseworkers or her children until she returned to Des Moines in May 1993. The State further contends the best interest of the children require the parents' parental rights be terminated.

The guardian ad litem that joined in the notice of appeal has not filed a brief nor appeared to argue. The guardian ad litem is reminded that the function of the guardian ad litem is an advocate of the children. See re J.V., 464 N.W.2d 887, 893 (Iowa App. 1990).

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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, 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.

The trial court refused to terminate finding it was impressed with testimony of a Department of Human Services worker who found that three years before the children's removal the mother properly cared for her children. The trial court also made a finding it was impressed with the mother's sincerity and her struggle to regain her physical and emotional health before returning to Iowa to deal with legal problems and the return of her children. The trial court found the mother was open and honest about her struggle with substance abuse problems. The trial court found the mother should have another six months to regain custody of her children and ordered she immediately have liberal visitation with her children.

We find no reason to disagree with the trial court's findings and give weight to its credibility assessment. We also find at the termination hearing the mother openly admitted her failures. We find from the State's evidence that the children clearly love their mother, are bonded to her, and worry about her. The State's evidence also is that the children are charming, bright children.

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There is no evidence the children were ever physically or sexually abused. The mother had strengths in parenting the children through their early years. The evidence of the children's attributes are evidence of the mother's parenting skills during the time the children were in her care.

The mother's election to absent herself from her children's lives for thirteen months weighs heavily in the State's favor. The mother was insensitive to the needs of her children in failing to recognize her importance in their lives and the turmoil the children obviously suffered because the mother they loved and care about just disappeared. However; we look at the mother's action in the context of her whole life as the trial court did. The physical and emotional trauma the mother suffered as a result of her attack must also be considered, particularly, where as here, the parenting deficiencies she is being charged with only occurred after the incident, and there is evidence of good parenting skills before the incident both from the testimony of a social worker and from an assessment of the children themselves when placed in foster care. The trial court found her forthright and sincere at the termination hearing. A finding we give credence to, and also find supported by the record.

There is not evidence the children suffered any physical or sexual abuse in their mother's care or that she ever presented any danger to them. While we condemn the

mother's irresponsibility in not returning to the children as she represented she would, we also note the children were left in a shelter where they were not in danger of harm as there were adults available at the shelter.

Factors considered in our decision are the children's ages, their love for their mother, and the bonding they have with her. We recognize legal termination of parental rights will not sever these feelings. There is a statement in the record that the children are adoptable but there is no other evidence of possible plans for them. The children are older and, while they appear to be children without serious problems, we recognize the state cannot guarantee them satisfactory adoptive homes.

We defer to the trial court judgment and affirm the decision not to terminate parental rights. We note the Supreme Court entered an injunction during the pendency of this appeal to preclude contact between the children and her mother. Having affirmed the trial court, we also concur with its order that immediate visitation be established between mother and children. We do not find reasonable efforts have been made since the trial court decision's to reunite the family.

The trial court, also, did not terminate the father's rights. He has not filed a brief in this appeal. We agree with the State that the father has done little or nothing to further the children's interests. There is not evidence the father presents any danger to the children. He was due

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to be released from prison. It would not be in the children's best interest for us to order termination of his parental rights because we would then be discharging his responsibility for child support. We affirm.

AFFIRMED.

DONIELSON, J. (dissenting)

I dissent. I find clear and convincing evidence in the record that Daniel and Crystal cannot be returned to Diane's care now. The juvenile court did not find Diane had yet demonstrated an ability to provide for the physical and emotional needs of her children. It did not find she had demonstrated she was able to maintain stable employment or to maintain her sobriety. The court did not find the children could be returned to Diane's care. Instead, it ordered visitation in the home she shares with her fiance and his friend. By her own testimony, the home is a very small two bedroom. When asked where the children would stay, she acknowledged that she would have to sleep on the floor or on the couch to be able to put the children in a bedroom. She has not completed any substance abuse program. At least twice she has left programs against medical advice. Although she testified she no longer abuses drugs, she still uses alcohol, which has led her into trouble before.

Daniel and Crystal have been out of Diane's custody for approximately eighteen months. "The crucial days of childhood cannot be suspended while parents experiment with ways to face up to their own problems." In the Interest of A.C., 415 N.W.2d 609, 613 (Iowa 1987). While I recognize the law requires a "full measure of patience with troubled parents who attempt to remedy a lack of parenting skills," Iowa has built this patience into the statutory scheme of

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chapter 232. Id. at 613-14. It provides this patience by prescribing certain steps to protect the rights of parents in termination proceedings. In the Interest of I.L.G.R., 433 N.W.2d 681, 689 (Iowa 1988). Plans which exceed the twelve-month period during which a parent tries to achieve adequate parenting skills are viewed with a sense of urgency. In the Interest of L.L., 459 N.W.2d 489, 495 (Iowa 1990). In cases meeting the criteria of Iowa Code section 232.116(1)(e), the legislature "has made a categorical determination that the needs of a child are promoted by termination of parental rights." In the Interest of M.W., 458 N.W.2d 847, 850 (Iowa 1990).

I find clear and convincing evidence the statutory grounds for termination in Iowa Code section 232.116(1)(e) have been met. It is unfair to Daniel and Crystal to subject them to six months more of "the wanderings of judicial process." In the Interest of A.C., 415 N.W.2d at 613. These "resilient, wonderful little kids" need and deserve stability. They are adoptable. The juvenile court erred in not terminating Diane's parental rights pursuant to Iowa Codes section 232.116(1)(e).

I also find clear and convincing evidence that Daniel Sr. has abandoned Daniel Jr. and Crystal within the meaning of Iowa Code section 232.116(1)(b). The juvenile court should have terminated his parental rights.

I would reverse the juvenile court and remand for an order terminating Daniel Sr.'s and Diane's parental rights to Daniel Jr. and Crystal.