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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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IN THE INTERESTS OF W.L.H., et al., Children.) Filed February 24, 1982) 1-412 3-66338

Appeal from Hancock District Court - Ralph McCartney, Judge.

Natural parents appeal from termination of their parental rights as to their seven children pursuant to section 232.114(5), The Code 1979. AFFIRMED.

Philip L. Garland, Garner, Iowa, for appellants.

Brent D. Hege, Assistant Attorney General, for appellee State of Iowa.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Natural parents appeal from termination of their parental rights as to their seven children pursuant to section 232.114(5), The Code 1979. They argue that there was not clear and convincing evidence that the children could not be returned to their custody. In the alternative, they seek restoration of their parental rights as to the four older children. We affirm the trial court's decision terminating parental rights as to all seven children.

Appellants are the natural parents of Wayne, born January 30, 1966; Rodney, born January 12, 1967; Tammy, born February 14, 1968; Todd, born March 11, 1969; Greg, born August 3, 1970; William, born January 25, 1973; and Ted, born April 5, 1974. On December 8, 1978, the Department of Social Services (DSS) took all seven children into emergency custody. On March 19, 1979, an order was entered finding them children in need of assistance (CHINA). The CHINA petition had alleged sections 232.2(13)(b)(g) and (h), The Code 1977, as its jurisdictional basis and the adjudication was grounded upon section 232.2(13)(g). The adjudication also ordered the parents to undergo evaluation and marriage counseling, and to participate in child care services and cooperate with DSS.

After extensive investigation, the guardian ad litem who represented all of the children, recommended termination of parental rights of only the three younger children, primarily because of the long delay between the emergency removal of the children from the home and the final disposition of their status. In the alternative, he recommended termination of all seven. DSS consistently recommended termination as to all of the children. The record reflects that some of the counselors involved with individual children did not recommend termination, but agreed that the parents were not capable of having all seven children returned to their home at once. In the case of at least one of the children, Todd, the evidence was clear that he would be unable to leave his residential treatment program for at least two years regardless of the outcome of

termination proceedings.

The trial court found that the emergency placement was due to physical abuse of the children and, in particular, of Tammy and Rodney. In this instance, their father had thrown them across the room. Subsequent investigation revealed a history of beatings as well as at least one instance when the father had hung these two in the basement with a belt because he said they had eaten some of his potato chips.

At time of trial, the court found that Wayne was living at the Waterloo Quakerdale Home. He had made considerable progress both in social skills and sexual development, and his intelligence was in the dull to normal range. His counselor did not believe he could be returned home given his current problems and learning disabilities.

The evidence shows that Todd has low normal intelligence and is operating at a second- rather than fifth-grade level. He has limited social skills and is emotionally disturbed. He expresses positive feelings about his parents, but his counselor, although not positive that termination was appropriate, believed that Todd's behavior disorders were so severe that there was only a limited possibility of home visits for several years. Todd was evaluated at Cherokee Mental Health Institute and was residing at trial time at the Gerard foster group home in Mason City.

Rodney lived in foster care after removal and then, because of personality problems, was moved to the Marshalltown Quakerdale Home. Rodney expresses some desire to return home--on a trial basis only--but his counselor indicates that Rodney cannot talk about conditions in his home without becoming emotionally disturbed. The counselor also notes that when Rodney mentions going on home visits he means to his foster home, not his parental home.

Tammy is living in a foster home in Mason City. She is receiving counseling and psychological help at the local mental health center, and her counselor, who

once feared that she would have to be hospitalized for her problems, has been amazed at her progress and adjustment. Tammy is not sure about her feelings concerning the termination, but experiences severe regression both before and after visitation with her parents. Despite her progress, her counselor testified that Tammy would be damaged if she were returned to her home.

The three youngest children, Greg, William, and Ted, are in one foster home. Greg and William have learning and emotional problems and are receiving help for those difficulties. The physical condition of all three has improved greatly, as have their personal attitudes and related emotional problems such as destructive conduct, outbursts of anger, and disciplinary conflicts. The court found these three were very concerned about returning home, and most wanted to be somewhere with love and support.

After considering voluminous evidence, both testimonial and documentary, the trial court said:

> The Court further concludes that there is clear and convincing evidence that the children cannot be returned to the custody of their parents as provided in § 232.102. The Court concludes that the clear and convincing evidence shows that the children cannot be protected from some harm which would justify their adjudication as children in need of assistance. In this particular case the Court concludes that the clear and convincing evidence clearly supports the finding that the children are all in need of treatment to alleviate severe mental illnesses or disorders and emotional damages which have been evidenced by aggressive behavior, depressions, withdrawals and anxieties, both toward themselves and to others.
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> A return to this home of these seven children at this time, or in any foreseeable future time, is not indicated by any reading of the record. Prolonging the hard decision posed by the petition for termination would not, in the opinion of the Court, result in any other foreseeable consequence.

The trial court terminated the parental rights as to all seven children. On this appeal, the natural parents argue that the trial court did not base its decision on

clear and convincing evidence. They also ask that, if this court finds termination of the three younger children to be proper, that it not approve termination of parental rights as to the four older children.

I. **Scope of Review.** We consider the evidence presented to the trial court **de novo**, and the quantum of proof necessary to support termination is clear and convincing. In Interest of Voeltz, 271 N.W.2d 719, 722 (Iowa 1979).

II. **Legal Principles.** In determining whether or not termination is proper, we do consider parental rights. In Interest of Voeltz, 271 N.W.2d at 722. There exists a parental right to the integrity of the familial relationship, unless by conduct that relationship is forfeited. In Interest of Lewis, 257 N.W.2d 505, 510 (Iowa 1977). But this parental interest in familial integrity must be balanced against the long-range best interests of the children. The test, on reviewing the whole record, is whether, despite past conduct, the parents can assume parental duties responsibly within the time periods specified by the legislature. In Interest of Voeltz, 271 N.W.2d at 723.

Children should not be compelled to wait for their parents' maturity. In re Leoffelholz, 162 N.W.2d 415, 425 (Iowa 1968). They should not be left in a parentless limbo indefinitely. In Interest of Kester, 228 N.W.2d 107, 110 (Iowa 1975). A determination of the best interests of children necessarily is based on what is likely to occur in the future because of the present conditions and because of what has occurred in the past. In re Freund, 216 N.W.2d 366, 369 (Iowa 1974). The past performance of the parents is considered in order to gain some insight into the quality of the future care likely to be given by them. In Interest of Ponx, 276 N.W.2d 425, 433 (Iowa 1979).

Termination of parental rights is proper under our laws when:

> The court finds that:
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> 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
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> 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.

Section 232.114(5), The Code 1979.

III. Sufficiency of the Evidence. There is no question but that these children have been declared children in need of assistance; neither is there disagreement as to their having been removed from their parents custody and control for at least twelve months. The fighting issue is whether this record discloses "clear and convincing evidence that the child[ren] cannot be returned to the custody of [their] parents as provided in section 232.102." § 232.114(5)(c); In Interest of Adkins, 298 N.W.2d 273, 278 (Iowa 1980). The parents here maintain there is insufficient evidence to support termination; in the alternative, they urge that there is insufficient evidence to terminate their rights to the four oldest children. We disagree.

The parents have made some limited progress in the two to five months prior to the termination hearing. Such progress is to be commended, but in considering their past record to determine their future conduct, as we must, we cannot say that any reported changes are either substantial or necessarily permanent. Against such changes we must consider the deplorable conditions and treatment of the children at the time of their removal, the initial and continuing failure of the parents, until fairly recently, to cooperate with counseling and other services offered by DSS, and the long history this family has had of general inability to cope with their many problems.[1] The children have already been out of the home and in limbo for more than two years, and they cannot await their parents' maturity any longer.

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[1] DSS has documented 76 contacts over ten years preceding the removal of the children; the school nurse and public health nurse have many years of reports dealing with their attempts to help the family.

We see no benefit to the four older children in refusing to terminate parental rights as to them. All seven children have suffered at the hands of these parents, although, simply because of being older, Wayne, Rodney, Tammy, and Todd exhibit more obvious ill effects. Some of the four expressed a limited desire to return to their parents, but the record indicates that, at best, their feelings were ambivalent. Furthermore, in the cases of Rodney and Todd, even if the relationship were not terminated, reports indicate that it would be some time before their treatment programs would be completed and they could return home. In Tammy's case there was direct evidence that she would suffer damage if returned. There is also evidence that the children feel a need to get their situation resolved one way or another. We believe that the reasons for termination cannot be stated better than by the trial court:

> This is a tragic situation. Little children have suffered emotional scars that may never be eradicated, but the best hope lies in the continuance of their care by others. They do have capabilities and they have made progress and this should not be endangered.
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> The Court concludes that although the parents have made efforts to overcome certain of their inadequacies, the needs of the children, their special problems and a beneficial future prognosis, all will be better served by termination and that the parents' efforts do not compensate for these needs so as to cast the evidence into a balance.

The order of the trial court terminating parental rights as to all seven of the children is affirmed.

AFFIRMED.

All judges concur except Oxberger, C.J., who dissents.

OXBERGER, C.J., (dissenting).

I dissent with the majority's decision to terminate parental rights to all seven children. I would recommend a split termination, with parental rights being terminated as to the three youngest children, but with the four older children being returned to the home gradually.

I do not dispute that until the children were removed from the home in 1978 the home situation was deplorable and the outlook for a healthy family relationship was bleak indeed. Despite the previous problems, the present condition of the home and the attitudes and motivation of the parents have improved to the point where some of the children could eventually be returned to their parental home.

Based on some of the children's desires to eventually return home, the improved home situation and the parents' sincere attempts to change and cooperate with everyone trying to help them, I cannot agree with the complete termination of these parents' interests in their children. Section 232.116(6)(b), The Code, provides that if a child over ten objects to termination, the court need not terminate. When I survey some of the evidence the court relied upon to make its decision, I see that the recommendation of a social worker who had not been in the family home for six months was relied on and that quality visitation has not been allowed in the home for over two years.

Though we in general do not break up siblings, in this case it is advisable. The parents are of limited intelligence, and all seven of the children back in home may be beyond their capabilities. The older children are psychologically attached to their parents. The younger children are not as psychologically attached and need the stability and positive atmospheres of their present foster families if they are to continue developing normally.

I would remand to the district court to have them reestablish parental rights to the four older children. The four older children should have their counseling and treatment programs continued, and they should be returned to the home gradually, beginning with weekend visitation.