FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN THE INTEREST OF C.A.M., A Child,)
L.M. and K.M., Natural Parents,)
Appellants.)

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2-201
3-67596

Appeal from Warren District Court - Richard D. Morr, Judge.

The natural parents of a minor child appeal from the trial court's order terminating the parent-child relationship contending: 1) that the evidence did not support trial court's conclusion that the child cannot be returned to their custody; 2) that the record was improperly reopened at the State's request; 3) that the natural father was denied an opportunity to be heard because the court failed to secure his presence at the hearing to reopen the evidence; and 4) that trial court erred by permitting the State to relitigate the basis for finding the child was originally "in need of assistance." AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

Robert A. Gottschald, Indianola, Iowa, and Claire B. Patin, Indianola, Iowa, attorneys for appellants.

Thomas J. Miller, Attorney General of Iowa, and Brent Hegge, Assistant Attorney General, for the State of Iowa.

Louis M. Fusco, Indianola, Iowa, attorney for the child.

Considered en banc.

The natural parents of a minor child appeal from trial court's order terminating the parent-child relationship. They contend: 1) that the evidence did not support trial court's conclusion that the child cannot be returned to their custody; 2) that the record was improperly reopened at the State's request; 3) that the natural father was denied an opportunity to be heard because the court failed to secure his presence at the hearing to reopen the evidence; and 4) that the trial court erred by permitting the State to relitigate the basis for finding the child was originally "in need of assistance." We affirm that part of trial court's judgment terminating the natural father's parental rights, but reverse that part terminating the mother's parental rights.

The child in question was removed from his parents' physical custody in November, 1979, at the age of 3 months, after doctors discovered injuries consistent with child abuse. He has lived in a foster home since that time. In March, 1980, he was adjudicated to be a child in need of assistance. In April, 1981, the State filed a petition asking that the parent-child relationship be terminated on the grounds stated in Iowa Code § 232.116(5) (1981).

The natural father was unable to attend the initial hearing on the termination petition because he was incarcerated in a federal prison. He did not, at that time, make any request to be present personally. However, after the hearing the State filed a successful application to reopen the record to admit evidence of the parents' drug abuse. The natural father's attorney then filed an application requesting that the sheriff be directed to bring the natural father to the second hearing. Trial court overruled this application.

Following the second hearing, trial court terminated the parent-child relationship on the grounds stated in section 232.116(5). There is no dispute that the child had been outside his natural parents' custody for a year and had been adjudicated to be a child in need of assistance as required by that section. Trial court additionally concluded there was clear and convincing evidence that the child could not be returned to his natural parents' custody. The natural parents appeal from trial court's judgment.

I. Scope of Review. Appellate review of proceedings to terminate a parent-child relationship is **de novo** and, while we accord weight to the findings of the trial court, we are not bound by those findings. In Interest of Dameron, 306 N.W.2d 743, 745 (Iowa 1981).

II. Absence of Incarcerated Father. The natural father claims that the trial court erred in not granting his application to be present for the hearing to reopen the evidence. We are not persuaded by his arguments.

The natural father applied to the juvenile court on June 23, 1981, for an "order requesting the Warren County Sheriff to go to the federal penetentiary at Sandstone, Minnesota, and transport [K.M.] to Warren County, Iowa, so that he may be present for all subsequent hearings in regard to the parent-child severence." He claims the court's failure to grant his application resulted in a violation of his fourteenth amendment right of due process. He also asserts that the court violated Iowa Code § 232.112(1) (1981). This application was filed after the termination hearing held on June 11, 1981, and before the July 6, 1981, hearing to reopen the evidence upon the motion of the State. The father was represented by counsel at the June 11, 1981, hearing on termination. The same counsel represented the natural father at the time the additional evidence was received by the court.

This court notes that the father alleged only a statutory basis for the court to order his presence at the hearing to reopen the evidence. He did not raise the constitutional dimensions of his absence in his application nor at the time of hearing. The natural father raises his constitutional issues for the first time on appeal. See In Interest of Hoppe, 289 N.W.2d 613, 617 (Iowa 1980). Since the constitutional issues were not presented to the trial court, we will not consider them now. See In Interest of Voeltz, 271 N.W.2d 719, 722 (Iowa 1978).

The father next asserts that his absence was in contravention of Iowa Code § 232.112(1), which provides:

> Persons listed in section 232.111, subsection 3, shall be necessary parties to a termination of parent-child relationship proceeding and are entitled to receive notice and an opportunity to be heard, except that notice may be dispensed with in the case of any said person whose name or whereabouts the court determines is unknown and cannot be ascertained by reasonably diligent search.

The father asserts that the "opportunity to be heard" requires physical presence. We disagree.

It was not reversible error for the trial court to overrule a request for the production of a prisoner confined in a penitentiary in a civil matter. See Collings v Gibson, 220 N.W. 338, 339 (Iowa 1928). See Iowa R. Civ. P. 13. The absence of an incarcerated parent in a parental termination proceeding has been held by several states to be nonviolative of the absent parent's rights. See In the Matter of Welfare of H.G.B., 306 N.W.2d 821 (Minn. 1981); In the Interest of S.H., 283 N W.2d 202 (N.D. 1979); In the Matter of Rich, 604 Pac. 2d 1248 (Okla. 1979).

In the present case, the father was represented by able counsel, who in fact participated in and resisted the reopening of the evidence. The father could have appeared through deposition or affidavits and produced evidence in support of a defense. He, however, does not assert any defense in his application. This court also finds the fact that he did not file such an application prior to the hearing on the termination, but rather, only after the State requested a reopening of the evidence, relevant in our consideration of the facts. Accordingly, we affirm the trial court's denial of the father's application to be present at the hearing to reopen the evidence.

III. Relitigation of CHINA Adjudication. The natural parents contend that trial court erred in relitigating the CHINA adjudication. The State concedes that a relitigation would be error if it occurred. In Interest of Welcher, 243 N W.2d 841, 844 (Iowa 1976). The State asserts, however, that the action of the trial court was consistent with the elements of proof required in Iowa Code

§ 232.116(5) (1981), and the principles established in In Interest of Adkins, 298 N.W.2d 273 (Iowa 1980). We agree with the State's position.

The elements of proof in a termination of parental rights proceedings are that:

> a. the child has been adjudicated a child in need of assistance pursuant to section 232.96; and
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> 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.

Iowa Code § 232.116(5). In this case, the State introduced the transcript of the CHINA proceeding to establish element (a).

The natural parents contend that the order of the court in the CHINA proceeding in which the trial court found "neglect" was res judicata against any finding of "physical abuse" by the court in the termination proceeding. The CHINA decree stated:

> . . . the court having examined the file and being fully advised in the premises, finds and rules that by clear and convincing evidence injury to the above-named juvenile did not occur in the manner described by the parents. The court finds and rules that the parents have neglected said child and may neglect said child in the future. The court hereby adjudicates the above-named juvenile to be a child in need of assistance for reasons of neglect pursuant to Section 232.2(5)(b), Code of Iowa (1979).

The appellants cite to the decree of the court in the termination proceeding as evidence of a relitigation of the adjudication in the CHINA matter. Specifically, they focus on the statement of the court that "the injuries resulted from abuse inflicted upon the child." The trial court goes on specifically to reiterate the findings of the trial court in the CHINA proceeding: that the injuries sustained by the child were inconsistent with the story of the parents.

In the order from the CHINA proceeding the word "neglect" was attached to a finding made pursuant to section 232.2(5)(b), which provides: "whose parent, guardian or other custodian has physically abused or neglected the child, or is imminently likely to abuse or neglect the child." Moreover, section 232.2(37) defines the term "physical abuse or neglect" as follows: "'physical abuse or neglect' or 'abuse or neglect' means any nonaccidental physical injury suffered by a child as the result of the acts or omissions of the child's parent, guardian or custodian or other person legally responsible for the child."

We find appellants' semantic argument regarding the res judicata effect of the use of the term "neglect" in the order of the court in the CHINA proceeding untenable and unfounded on the record before us. There is no evidence that the trial court in the termination proceeding relitigated, or permitted the relitigation of, any basis for the finding in the CHINA adjudication. We conclude that any reference to the basis for the CHINA adjudication was made with regard to the elements of proof for termination of parental rights pursuant to section 232.116(5).

IV. Reopening of Evidence. Appellants also claim that trial court erred in reopening the record to admit additional evidence. Their resistance to State's motion to reopen the evidence was based on the argument that the best interests of the child required an expeditious resolution of the matter. On appeal they base their argument on Iowa Rule of Civil Procedure 192 and the State's failure to show "oversight or mistake."

On appeal we "adjudicate rights anew on those propositions properly preserved and presented to us." In Interest of Dameron, 306 N.W.2d at 745. Since we conclude that appellants did not preserve this issue for our review, we need not consider their argument regarding the applicability of the Iowa Rules of Civil Procedure to termination proceedings, although we note its probable lack of merit. See In Interest of Hewitt, 272 N.W.2d 852 (Iowa 1978).

V. Sufficiency of the Evidence. On the merits, appellants assert that there is no clear and convincing evidence that the child cannot be returned to their custody as provided in section 232.102. In examining the record before us, we are guided by well established principles which were stated by the court 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 this 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]
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> 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]
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> 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]
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> Finally, as previously noted, the grounds alleged here for the termination of parental rights must by statute be proven by clear and convincing evidence. [citation]

306 N.W.2d at 745.

On the basis of our **de novo** review of the record, we find that there is clear and convincing evidence that the child cannot be returned to the father. Our paramount interest is that of the child's. He has demonstrated by his past performance that he is incapable of supplying the needs of the child. Accordingly, we affirm the trial court's ruling that it is in the best interest of the child that the parental rights of the father be terminated.

A much more difficult situation arises in examining whether the mother should retain her parental status. There is considerable evidence in the record that the mother has made serious attempts to straighten out her life and has achieved some success in her endeavors. It is her desire that the child be returned to her. We are unable to say that based upon the record before us that the State has shown by clear and convincing evidence that the mother's parental rights should be terminated.

In support of the mother's contentions, Bob Glass, a court-appointed therapist, testified that the mother had made tremendous strides in her parenting abilities in the last year and one-half. She has begun taking herself more seriously and conducting herself in a more responsible fashion. She appears not only more open to a discussion of her problems, but also committed to finding solutions.

We further believe that the mother's problems were not totally self-induced. There is evidence in the record that the social worker and foster parents thwarted the development of a solid parent-child relationship by severely restricting the mother's visitation privileges. The social worker never permitted the mother to visit the child outside the foster home and limited visitation to three hours per week. Additionally, the foster parents never allowed the mother to visit alone with the child. The foster parents further requested that the mother not bring the child's sibling to their home for visitation. This denial was not only detrimental to the development of a sibling relationship, but also hampered the mother's ability to exercise visitation rights since a sitter was needed for her other child.

Most disconcerting is the fact that the foster parents had a desire to adopt the child and expressed this openly to the mother. It is evident that there was considerable ill will between the mother and the foster parents. The social worker's recommendation that the parental rights be terminated coincided with the initiation of an investigation by DSS into the possibility of adoption by the foster parents. The social worker insists that this was mere coincidence. The

mother argues conspiracy. Regardless of the real facts, the the tense atmosphere between the parties is not conducive to the stated purpose of "providing rehabilitative services . . . to abused children and their families which will stabilize the home environment so that the family can remain intact without further danger to the child." See Iowa Code § 232.67 (1981). It is also inconsistent with the stated goals of chapter 232 that "[t]his chapter shall be liberally construed to the end that each child under the jurisdiction of the court shall receive, preferrably in his or her own home, the care, guidance and control that will best serve the child's welfare and the best interest of the state." Iowa Code § 232.1 (1981) (emphasis added).

During the period after the child had been adjudicated a child in need of assistance, the mother had little opportunity to improve her parenting skills to the satisfaction of DSS due to her incarceration. Since her release "very positive changes" have occurred in her attitude and actions toward the child. Even the social worker noted the mother's recent development; however, she lamented that the mother's efforts were too little and too late. We disagree.

The court in In Interest of Adkins, 298 N.W.2d 273 (Iowa 1980), examined the facts of the case with the standard of whether "palpable change from the conditions that led to the CHINA action [had occurred]." Id. at 278. We need not intimate whether we would have terminated the parental rights on the facts shown at the CHINA adjudication but rather, we must decide this matter on the facts as they existed at the time of the termination decree. We find that a "palpable change" had occurred in the mother's relationship with the child since the CHINA adjudication which is consistent with the best interests of the child.

It is important for this court to reconcile the apparent disparate treatment afforded the two natural parents. The mother and father have been separated by reason of incarceration since September, 1980. The mother was released in February, 1981. It was the period subsequent to the release that her marked

improvement occurred. The record provides no certain time when the father may be released, except that he "hopefully" was to be released in late 1981 or early 1982. The parents' separation has resulted in an increased awareness by the mother of her parental responsibilities. Further, the family unit has consisted of the mother and the child's sibling and this unit has demonstrated greater signs of stability than when the father was present. The extended absence of the father appears to have a beneficial effect on the unit. There is absolutely no evidence in the record that the father has made any efforts at becoming a competent parent. As has been previously noted in this opinion, the father had an opportunity to produce such evidence at the termination hearing but did not do so. But should a natural parent making a sincere effort at rehabilitation be penalized for a spouse's failure as a parent? We think not, based upon the record before us.

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 rather may be forfeited by certain parental conduct." See In Interest of Dameron, 306 N.W.2d at 745. Looking at the child's long-range interest in the home of its parent, we believe "[i]nsight . . . can be gained from evidence of the parent's past performance, for that performance may be indicative of the quality of the future care that parent is capable of providing." See In Interest of Dameron, 306 N.W.2d at 745. In the present case, we believe the mother's performance since her incarceration demonstrates her capability of satisfying the needs of the child.

We are cognizant, however, of the possibility that the father may join the current family upon his release. If the father does in fact join the unit, the mother may be confronted with many difficult decisions. If the father's presence detrimentally affects the family unit so as to threaten the best interests of the child, and the mother elects to have the father present, this court would not hesitate to sever her parental relationship with the child upon application.

While we find the facts do not presently warrant the termination of the mother's rights, the facts seem precariously close to such a result. During the period immediately following the issuance of procedendo in this opinion, the mother and child will be living in a proverbial house of glass, subject to the rigorous scrutiny of DSS and the court. If at any time the mother ceases her growth as a parent or exposes the child to the type of environment which led to the CHINA adjudication, her rights to the child may be terminated upon application to the court.

Thus, regardless of the mother's growth, we conclude that it is in the best interests of the child that its CHINA status continue with monitoring by and supervision of DSS. Upon remand, the trial court should order the mother to continue such therapy programs as are warranted. Additionally, the court should set a time for hearing at a date no later than six months from the issuance of procedendo in this opinion for the purpose of reviewing the status of the child pursuant to the CHINA adjudication, giving particular attention to the progress of the mother's parenting skills, her cooperation in therapy, the marital environment of the mother and the effect of the father on the family unit if he is a part of that unit. We fully recognize that this court has placed an additional burden upon the State by this decision. However, balancing that requirement against the prospective loss of rights, we believe it is warranted by the record.

Accordingly, we affirm the trial court's judgment terminating the father's parental rights. We reverse the termination of the mother's parental rights and remand this case to the trial court with instructions.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.