

IN THE COURT OF APPEALS OF IOWA

No. 1-291 / 91-0358

FILED

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CLERK SUPREME COURT

IN THE INTEREST OF A.L.S., A Minor Child.

STATE OF IOWA,

Appellant.

343

Appeal from the Iowa District Court for Warren County,
William Joy, Judge.

The State and guardian ad litem appeal a judgment of the district court dismissing a termination petition as to two minor children of E.S. and R.S. The State appeals the decision as to the child A.L.S. primarily on the grounds that there was clear and convincing evidence in the record to prove that uprooting A.L.S. to place her in her father's home would cause her to suffer emotional trauma. The guardian ad litem asserts the trial court's findings are lacking and contradictory. **AFFIRMED.**

Bonnie J. Campbell, Attorney General; John M. Parmeter, Assistant Attorney General; and Charles K. Phillips, Assistant Attorney General, for appellant State.

Claire B. Patin of Elgin, Clogg & Patin, Indianola, for appellee natural father.

Robert A. Gottschald, Indianola, for appellee natural mother.

Heard by Oxberger, C.J., and Donielson and Habhab, JJ.

DONIELSON, J.

A.L.S. was born to E.S. and R.S. on November 18, 1983. The marriage of her mother and father was dissolved in 1987, and the parents were granted joint legal custody. R.S., the mother, was granted primary physical care of the children, and E.S., the father, was granted holiday and weekend visitation.

On June 12, 1988, during one of the father's visits, he discovered welts and bruises on A.L.S.'s legs. The next day, the father filed a child abuse report and the possibility of abuse was brought to the attention of the Department of Human Services (DHS). The attending physician reported the existence of bruises consistent with injuries inflicted by a belt. A.L.S. indicated to the department caseworker that the paramours of both parents were responsible for the bruises. A.L.S. also indicated that her parents' paramours were responsible for spanking and hitting her and her brother.

A founded child abuse report concluded that A.L.S. had bruises on her buttocks, left anterior thigh and right anterior thigh resulting from spankings administered by the paramours of E.S. and R.S. Neither parent had been present during the spankings. The report also concluded that physical abuse by omission on the part of either E.S. or R.S. was unfounded. A.L.S. was later found to have been sexually abused by a paramour of R.S.

On June 27, 1988, the DHS filed a Child in Need of Assistance petition on A.L.S. The petition alleged physical abuse and lack of effective supervision of A.L.S. A petition was filed on J.S., A.L.S.'s brother, based on the request of both E.S. and R.S. that they be relieved of J.S.'s care and custody. An adjudicatory hearing was held on June 30, 1988. A.L.S. was adjudicated a child in need of assistance based on the evidence that A.L.S. was being abused by her mother's paramour and that R.S. did not have the capability to properly supervise and protect A.L.S. from such abuse. The court ordered that A.L.S. be placed in foster care.

On July 25, 1988, another child abuse report was filed regarding A.L.S. The report noted that A.L.S. had drawn inappropriate, sexually-explicit pictures of her mother. A.L.S. indicated in an interview that her mother's paramour had touched her genitals with his fingers and that he often spanked her hard and "thumped" her on the head. An examination performed on A.L.S. resulted in findings consistent with digital fondling, without penetration, of her vagina.

A dispositional hearing was held on September 22, 1988, and foster care placement was continued. A review hearing was held in March 1989. It was determined that E.S. and R.S. were attending visitation with the children, but they declined to participate in in-home family therapy because they felt it to be unnecessary. The caseworkers reported

that A.L.S. was progressing fairly well in foster care, but she missed her mother. She expressed ambiguous feelings about her father. J.S., her brother, was diagnosed as severely disturbed.

In July 1989, E.S. and his new wife, R.R., agreed to in-home counseling, and the first report was filed in October 1989. The counselor believed that foster care was better for the two children than placement with their father. She indicated that neither E.S. nor R.R. understood what it would mean to have both children back in their home. Subsequent evaluations and reports indicated that A.L.S. was assimilating nicely in her foster home and she did not seem upset when her parents failed to show on visitation.

In May 1990, protective homemaker services were canceled due to lack of attendance by E.S. and R.R. The matter ultimately came for a termination hearing in December 1990 and January 1991. At the hearing a recommendation was made for termination of parental rights. The recommendation was based on the caseworkers' evaluations that neither parent understood the responsibilities of having the children at home and that A.L.S. would likely be subjected to further physical and sexual abuse.

However, the district court refused to order termination. The court found that the State had failed to establish by clear and convincing evidence that, at the

time of the hearing, A.L.S. could not be placed in the custody of her father. On the contrary, the court found that there was clear and convincing evidence that A.L.S. had a close parent-child relationship with her father, the termination of which would be detrimental to her.

Accordingly, the court dismissed the petition to terminate E.S.'s parental rights with respect to A.L.S. and ordered that A.L.S. be placed in her father's home. The court directed the DHS to devise an appropriate plan and course of assistance for A.L.S.'s integration into the home.

Next, the court found the State had met its burden of proving that A.L.S. could not, at the time of the hearing, be returned to the custody of her mother. Nevertheless, the court declined to order the mother's parental rights terminated. The court did so for two reasons. First, the court concluded that termination was inappropriate because the children will benefit from continued contact with their mother, albeit at all times supervised. Second, the court's order placing A.L.S. in the father's home made the reasons for termination of the mother's rights much less compelling. The State and guardian ad litem appeal the court's refusal to terminate either parent's parental rights with respect to A.L.S.

Appellate review of termination proceedings is de novo. In re W.G., 349 N.W.2d 487, 491 (Iowa 1984), cert. denied, 469 U.S. 1222, 105 S. Ct. 1212, 84 L. Ed. 2d 353

(1985). We give weight to the juvenile court's factual findings, especially when considering the credibility of witnesses, but we are not bound by those determinations. Id. at 491-92.

Our paramount concern in these proceedings is the best interest of the child. Iowa R. App. P. 14(f)(15); In re Dameron, 306 N.W.2d 743, 745 (Iowa 1981).

We look to the child's long-range, as well as immediate, interests. We consider what the future holds for the child if returned to his or her parents. Insight for this determination can be gained from evidence of the parent's past performance, for that performance may be indicative of the quality of the future care the parent is capable of providing. Our statutory termination provisions are preventative as well as remedial. They are designed to prevent probable harm to a child.

In re R.M., 431 N.W.2d 196, 199 (Iowa App. 1988) (citing Dameron, 306 N.W.2d at 745); see also In re A.C., 415 N.W.2d 609, 613 (Iowa 1987).

We are also mindful of the rebuttable presumption that a child's best interest is served when the child's natural parents maintain custody. In re K.J.F., 425 N.W.2d 669, 671 (Iowa App. 1988). We find this presumption has not been rebutted, and we affirm the trial court's decision refusing to terminate parental rights.

Iowa Code section 232.116(1)(e) (1991) permits the juvenile court to terminate both the parental rights with respect to a child and the parent-child relationship if the court finds that all of the following have occurred:

- (1) The child is four years of age or older.
- (2) The child has been adjudicated a child in need of assistance pursuant to section 232.96.

(3) The custody of the child has been transferred from the child's parents for placement pursuant to section 232.102 for at least twelve of the last eighteen months, or for the last twelve consecutive months and any trial period at home has been less than thirty days.

(4) There is clear and convincing evidence that at the present time the child cannot be returned to the custody of the child's parents as provided in section 232.102.

There is no question in this case that the first three of these four elements have been satisfied. The dispute in this case concerns the fourth element--the court's determination that there was not clear and convincing evidence that A.L.S. would be subjected to any one of the types of harm described in Iowa Code section 232.2(6) if she were returned to the custody of her father at the time of the termination hearing.

The State's argument is as follows: Placement of A.L.S. with her father will cause her to suffer mental injury; the mental injury will be a result of uprooting A.L.S. from a home to which she has bonded; the bonding has happened as a result of A.L.S.'s long-term placement in the foster home; the placement was long-term because the father was "lackadaisical" in his efforts to have A.L.S. returned to his custody; as such, A.L.S. must remain in the custody of her foster home and her natural parents must be found to have forfeited their parental rights.

We cannot ignore the sense of irony evoked by the State's argument. It must be remembered that it was A.L.S.'s father, E.S., who filed the initial child abuse

report setting the wheels of the DHS in motion. It must also be remembered that E.S. has not been accused of neglecting or abusing the child either by act or omission. Nevertheless, the State argues that E.S.'s parental rights should be terminated for reasons due primarily to the success of his effort to get help for his daughter.

In In re Burney, the Iowa Supreme Court stated

Our cases have emphasized that parents should be encouraged in time of need to look for help in caring for their children without risking loss of custody. The presumption preferring parental custody is not overcome by a mere showing that such assistance was obtained. Nor is it overcome by showing that those who provided the assistance love the children and would provide them a good home. These circumstances are not alone sufficient to overcome the preference for parental custody.

259 N.W.2d 322, 324 (Iowa 1977)(quoting In re Guardianship of Sams, 256 N.W.2d 570, 573 (Iowa 1977)).

The court in Burney considered the argument that a transfer of custody would cause the child to suffer emotional trauma. Id. The court found that, under the circumstances of that case, the child had not been in the custody of others for so long that "an extraordinary threat to his well-being is posed by the prospective transfer." Id.(emphasis added).

A.L.S. may suffer some emotional trauma as a result of the transfer of custody. However, as in Burney, we find A.L.S. to be healthy, she knows her father, and she has not been in foster care so long that an extraordinary threat to her well-being is posed by the transfer. See id. We do

not believe that such emotional trauma would rise to the level of "mental injury" sufficient for a Child in Need of Assistance adjudication. See Iowa Code § 232.2(6)(c)(1) (1991). Neither would any emotional trauma be caused, as the statute requires, "by the acts of the child's parents." See id.

Furthermore, we find the trial court correctly concluded that the closeness of the parent-child relationship between E.S. and A.L.S. militates against termination of E.S.'s parental rights. The court need not terminate the parental rights if "[t]here 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." Iowa Code § 232.116(3)(c) (1991). We agree with the trial court that the record establishes clear and convincing evidence to support a finding that termination of A.L.S.'s relationship with her natural parents would be detrimental to A.L.S.

Finally, we find that the interests of the child are best served by reintegrating her into her father's home. In its argument, the State places great emphasis on its characterization of the father's behavior as showing "a lackadaisical, non-committal attitude towards getting [his daughter] back" We believe this characterization fails to properly take the broad context of the family predicament into account.

Nowhere in the record is it suggested that E.S.'s behavior prior to his filing of the original child abuse report was inappropriate. The record assures us that E.S. has made a good faith attempt to comply with the admittedly difficult requirements established by the DHS. It must also be recognized that his participation in the department's plan was necessitated, not by his own acts or omissions, but by the acts of others. Undoubtedly, E.S. is now quite set on gaining custody of his daughter.

We are convinced that the trial court's judgment advances the best interests of A.L.S. We believe the State has failed to establish by clear and convincing evidence that A.L.S. cannot be returned to the custody of her father.

The guardian ad litem for A.L.S. offers two additional arguments on appeal. Neither of the guardian's arguments is persuasive. Essentially, the guardian asserts that the trial court's order is inconsistent with its own findings.

First, the guardian argues that the court's order directing the DHS to devise a plan to facilitate a smooth reintegration of A.L.S. into her father's home demonstrates that the court did not believe that A.L.S. could be returned to the care of her parents at the time of the hearing. We disagree. Clearly, the court's direction to the DHS evidences only the court's desire to have the transition be as smooth as is possible.

The guardian's next argument focuses on the trial court's decision not to terminate the parental rights of R.S. The guardian asserts that the trial court found the existence of clear and convincing evidence warranting termination of R.S.'s parental rights, yet refused to do so. The guardian misunderstands the trial court's decision. We do not find the trial court's ruling to be inconsistent with its findings.

The trial court found that, were it faced only with the question of whether A.L.S. could be returned to her mother at the time of the hearing, then the court would have terminated the mother's rights. However, the court was not faced with that question. Rather, the court found that A.L.S. could be returned to her father's custody.

The court should generally decide whether a child can be returned to his or her parents at the end of the time set forth by the termination statute. See In re T.D.C., 336 N.W.2d 738, 744 (Iowa 1983). This reduces the possibility that a child will be forced to suffer a protracted period of foster care. See Long v. Long, 255 N.W.2d 140, 146 (Iowa 1977). A child must not be required to wait endlessly for the maturity of his or her natural parents. In re T.D.C., 336 N.W.2d at 744.

However, as A.L.S. was returned to her father, she would not be subjected to a "parentless limbo." See Long, 255 N.W.2d at 146. This made the trial court's decision on whether or not to terminate R.S.'s parental rights much

less urgent. Accordingly, the trial court declined to immediately terminate R.S.'s parental rights. We affirm the trial court.

The costs of this appeal are taxed to the State.

For all the reasons stated, the judgment of the district court is affirmed.

AFFIRMED.