

IN THE COURT OF APPEALS OF IOWA

FILED

SEP 28 1988

CLERK SUPREME COURT

IN THE INTEREST OF
B.L.B. and B.R.B.,
Minor Children,

D.B., Natural Father,
Appellant.

)

)

)

)

40

8-409
88-87

Appeal from the Iowa District Court for Adair County
(J-278 and J-279) - Robert O. Frederick, Senior Judge.

The father of two children appeals from the termination
of his parental rights. **REVERSED AND REMANDED.**

Susan K. Janssen, Winterset, for the appellant father.

Thomas J. Miller, Attorney General; Katherine E.
Miller-Todd, Assistant Attorney General; and Willard W.
Olesen, County Attorney, for the appellee State.

Considered by Donielson, P.J., and Schlegel, Sackett and
Habhab, JJ. Oxberger, C.J., and Hayden, J., take no part.

SACKETT, J.

41

D.B., the natural father of B.L.B. and B.R.B., appeals from an order terminating his parental rights. We must determine whether there is clear and convincing evidence the children will suffer harm if returned to their father's custody. The natural mother appealed but later withdrew the appeal. We do not find clear and convincing evidence the children cannot be returned to their father. We reverse and remand.

In April 1982 D.B. and L.B., the children's natural mother, were married to each other. The children, B.L.B., a daughter born July 1, 1978, and B.R.B., a daughter born April 30, 1980, were living with their parents. The family became involved with the Iowa Department of Human Services as a result of a child protective investigation referral. After some brief services, which included providing handicapped preschool for the oldest girl and some minimal counseling, the case was closed in September 1982. In 1983 human services was once again contacted by the family with a request for day-care services and also a request for mental health services for the mother.

During 1984 the couple were having marital problems and LB. admitted herself to Clarinda Mental Health Institute. Following her discharge, L.B. continued taking a drug, lithium, which had been prescribed for her mental problems. Also during this time the home was found to be filthy and

there were a number of cats in the home. In January 1985, following L.B.'s threats of suicide and of driving the car at 100 miles an hour into a brick wall with the children along, D.B. obtained an order removing L.B. from the home.

L.B., following her removal, found an apartment and began supporting herself. D.B. remained in the family home and had the total physical care of the children. B.L.B. attended school and B.R.B. attended preschool. D.B. did farm work. When the children could not be with him, the children stayed with their mother or a babysitter. This arrangement continued for approximately nine months. During this time B.L.B. attended school regularly and did well academically, and both children received regular dental and medical checkups.

The parents' marital problems were increased. The family's financial condition became critical as a result of the poor farm economy. The marriage broke down. D.B. had a near emotional breakdown. He admitted himself to the hospital for twenty-eight days. During this hospitalization, D.B. placed the children with his brother and sister-in-law. While the children were at the aunt and uncle's house, a report of suspected child sexual abuse was made and a child protective investigation was commenced. The aunt and uncle requested the children be removed to a foster home.

The investigation resulted in a recommendation that a petition for children in need of assistance be filed and the children be placed in the custody of the Department of Human Services for placement in a foster home pending the dispositional hearing. When D.B. was released from the hospital, he received notice the children had been placed in a foster home and the CHINA petition had been filed.

Following the trial, the children were adjudicated to be in need of assistance. The petition alleged the father had overmedicated one child and the children had been made to pose for nude photographs which were designed to appeal to prurient interests. The court found those allegations were not supported by clear and convincing evidence. The additional allegation that the parents had neglected or were imminently likely to neglect the children was found to be supported by clear and convincing evidence in that good housekeeping and attention to hygiene in the home were lacking. In addition, the court found that evidence supported sexual activity had taken place between the parents in the presence of the children which might have had or would have long lasting harmful results to the children. The court ordered both parents to submit to psychological evaluation and testing and continued the dispositional hearing until those evaluations and reports were received. Pending the evaluations, the children were to remain in foster care and in the custody of human services.

On November 1985, at the request of the foster parents, the children were removed to another foster home approximately fifty miles from the parents' homes. Visitation for the parents with the children was scheduled for approximately seven hours every other week. The visitation required the parents to travel approximately one hour to reach the foster home and one hour to return. The foster home was located in a town with little to do except go to the park. During the first several months of the children's residence in that foster home, L.B. visited them three times. D.B. attended every visitation he was allowed and requested time for phone calls and other contacts.

In March 1986 the dispositional hearing was held. The parties stipulated to the children remaining in the temporary custody of the Iowa Department of Human Services for placement in a foster family home. A further finding of the dispositional order was that neither parent had financial means to suitably care for the children, it would not be in the best interests of the children to change schools at the present time and there was substantial evidence the children's behavior regressed after visitations with their parents. The court further found the children could not be protected from some harm if they were returned to live with either parent. The parties were ordered to continue with in-home family treatment and the treatment should include the children as determined by a therapist and human

services. Visitation was continued on an every other Saturday basis, and human services was ordered to prepare a case permanency plan with the goal to reunite the children with one of the parents as soon as practical.

Visitation, counseling, and contact with human services continued for the parents and children through 1986. The parents continued to have problems communicating with one another regarding the children. D.B. continued to exercise visitation as allowed. He participated in scheduled counseling and evaluation sessions and attend STEP parenting classes.

Relationships between the children and their parents began to deteriorate. At the time the children were removed from the home, the children exhibited love for both their parents and a desire to be with their parents. As the period of foster care continued, there began to be a breakdown of the parent-child relationship. The children, particularly the oldest, B.L.B., began exhibiting behaviors adverse to her parents. This behavior included stating she would not go on visitations. She ran from her parents when they came to pick her up. She called her parents names and informed the foster parents and social workers that she did not want to be with her parents.

The children were moved to new foster homes. It was determined the girls should be placed in separate foster homes to eliminate the negative influence of each on the

other. That transition was accomplished and the visitation continued. This time the foster homes were a closer distance to the natural parents. It had been determined visitation should include evaluations in the presence of Dr. Craig Rypma and his associates, who practice child psychology. This necessitated the parents meeting the children in Des Moines at Rypma's office and then spending much of their visitation in evaluation and therapy with a psychologist present. The sessions at Rypma's were stressful on both the parents and children. Dr. Rypma eventually suggested termination of the parent-child relationship as to both parents.

A termination petition was filed in July 1987. Contacts between the parents and children were restricted and eventually stopped altogether.

An evidentiary hearing was held and the rights of both father and mother were terminated.

I.

WAS THERE CLEAR AND CONVINCING EVIDENCE THAT THE CHILDREN
WOULD SUFFER HARM IF RETURNED TO THE FATHER'S CUSTODY?

The Termination Petition was filed under Iowa Code section 232.116(1)(e) as amended by the first session of the 72nd General Assembly. The State accepted the burden to prove that:

- (1) the children were adjudicated as children in need of assistance under section 232.96;
- (2) the custody of the children had been transferred from the natural parents for at least twelve of the last eighteen months; and

(3) the children cannot be returned to the custody of the children's parents as provided in section 232.102. H.F. 567, 72nd G. A., Spec. Sess., 1987 Iowa Laws.

Section 232.102(4)(b) requires that the children should remain at home unless there is clear and convincing evidence that the children cannot be protected from some harm there. Iowa Code § 232.102(4)(b) (1987).

The State must prove the petition allegations by clear and convincing evidence. In re K.L.C., 372 N.W.2d 223, 227 (Iowa 1985). Our review is de novo. We give weight to the fact findings of the trial court but are not bound by them. In re W.G., 349 N.W.2d 487, 491 (Iowa 1984).

The father did an adequate job of parenting in the nine month period after his wife left and prior to his seeking hospitalization for his emotional problems. Foster care came about because of his hospitalization and was continued in a large part because of finances and the turmoil between the parents.

The trial court, in determining D.B.'s parental rights should be terminated, based its findings primarily on the fact he lacks ability to communicate and cannot handle conflict with the children and control them. D.B. contends the problems are caused at least in part by human services' failure to make reasonable efforts to keep the family correcting their parenting difficulties. He points also to the fact he may be painted with the same brush as the children's mother who, after the removal, made sporadic

visitation, gave minimal cooperation with offered services and was more concerned after the parties' separation with accumulating money for a house and car than she was in attempting to reestablish a relationship with her children.

Janice I. Hill, a licensed social worker, reported to the court prior to the termination hearing. Hill had been working with the family for approximately ten months during which time she saw D.B. thirty-nine times and the children six times. She also made contacts and held staffings with other therapists and service providers. In her report she said:

. . . In assessing Mr. D.B. as a parent, his assets include the following: he is very committed to his daughters and to being a good parent, he is very consistent in keeping appointments and visits, he demonstrates his caring for his daughters by visiting regularly, keeping appointments, and giving small gifts, and he attempts to live by his beliefs, even if they are unpopular. Those attributes that hinder effective parenting include the following: some difficulty communicating directly, without hidden agendas or inappropriate affect, the lack of a peaceful relationship with L.B., his difficulty resolving conflicts without his daughters being placed in the middle, the tendency toward rigid thinking, particularly under stress, at times interpreting disagreement as criticism, tendency to focus blame on others, and inconsistent reactions at times, either underreacting or overreacting. If D.B. can recognize those attributes that interfere in effective parenting and is committed to changing them, it is my belief that with more time and work in therapy, these can be modified.

I have given a great deal of thought to the obvious discrepancy between D.B.'s strong desire to regain custody of his daughters, and their adamant resistance to living with him. That degree of resistance is highly unusual, in my experience. My hypothesis about the sequence of events that have occurred over the past two years to create this situation is as follows: because of the marital

conflicts and turmoil between the parents, the children felt conflicting loyalties and a lack of safety with both parents; rather than place their allegiance with one parent, they rejected them both; they felt some support to do so either overtly or covertly, from foster parents, Department of Human Services, etc.; their parent's inappropriate behaviors continued to reinforce the children's negative feelings toward them.

I have examined the question as to whether "the plan failed the person," or "the person failed the plan." In my opinion, some of both has occurred. The various plans that have been outlined have failed D.B. with inconsistent support by workers, who were torn between their advocacy for the children and for the parent, with the children becoming too powerful, and the need for D.B. and L.B. to resolve issues between them satisfactorily was not emphasized enough, and the children were maintained in a position of conflicting loyalties between each parent, as well as between each parent, foster parents, etc. On the other hand, D.B. had great difficulty cooperating with the expectations of the Department of Human Services and the court, as his rigidity has tended to produce adversarial situations and negative reactions by the girls, and his behavior and attitude have at times given the appearance that he is too inconsistent to parent, for example selecting rather minor issues to focus on and miss the larger issue of the emotional impact on his daughters of his behavior.

It appears that largely everything of a therapeutic nature has been tried at least once over the past two years. Due to the parent's own rigid patterns and the girls' resistance to reuniting with them, there is obviously no quick solution involving the return of these girls to either parent's custody. The parents would have to make peace, probably through conjoint therapy, so that each could allow the children to have a relationship with the other parent and remove the children from the area of conflict; the Department of Human Services/Juvenile Court and the parents would also have to "make peace," with full support for the return of the children to one of the parents, so that the children would be out of the middle of those conflicts; D.B. (and L.B.) would need to continue working on their own individual issues that interfere with their ability to effectively parent these children. If all three of these things previously mentioned cannot occur, I am pessimistic about these children successfully

returning to live with their father, or their mother. D.B. has indicated that he will continue to work very hard to build positive relationships with his daughters and to pursue his goal of regaining their custody.

In our de novo review, we agree with her assessment of the relationship. We note the mother has not contested the termination of her rights. Consequently, if the termination of the father's rights is reversed, the disagreement between the parents as to the children's care will be removed from the relationship. The real and hard question we must address is whether the children's attitude toward their father justifies termination. B.L.B., the oldest child, is of above average intelligence and her school performance has been good. She began resisting visitations with both parents to the point of kicking and screaming, making it necessary to carry her to the car.

The desire of a minor child, as to where she wants to live, must be considered with other relevant factors including the age of the minor, the length of time in the home for which a preference is stated and the natural and legal rights of the parties. State ex rel. Bruner v. Sanders, 256 Iowa 999, 1006, 129 N.W.2d 602, 606 (1964). Custody should not be awarded on the basis of where the child wants to live, but rather on what is in the best interests of the children. Id. A child's preference does not take precedence. In re L.P., 370 N.W.2d 839, 843 (Iowa App. 1985). See also In re Marriage of Ellerbrock, 377 N.W.2d 257, 258

(Iowa App. 1985). And we must examine the preference carefully when to honor it would result in the termination of a party's parental rights.

This case is particularly difficult because we see a father who has made a very substantial and dedicated effort to regain his children's custody. The children were removed from his care at least in part by factors not totally within his control. He had a difficult marriage. His spouse suffered mental illness. The record bears out the fact she lacked the ability to help co-parent the children. The poor farm economy, again a factor over which he had little control, left him with few financial resources and a very limited ability to contribute to family expenses. See In re Marriage of Hoag, 380 N.W.2d 8, 10 (Iowa App. 1985). The pressure of these problems obviously resulted in his need to seek hospitalization because of emotional stress. It was during the hospitalization the children were placed in foster care where they have remained.

While foster care enabled the father to get his own life in better control, it also strained the relationship between the father and his daughters. The father seeks to blame human services for that alienation. The State admits the foster parents and human services may have contributed in part to the breakdown between these children and their father. The fact is the father also failed in his relationships with his daughters. They do not communicate.

Unfortunately, in this situation the interplay between the competing factors have resulted in the children being propelled into a position of power. Because the State must protect children from inadequate parents, it is imperative children must be brought into the circle of inquiry. Unfortunately sometimes, as here, to such an extent that it puts a child in a position of power. The children are given a power they have neither the maturity nor experience to properly exercise. It is easy for children to assume if they are adopted they will live happily ever after and their problems will be over. While these children live under this dream, we know they have unrealistic expectations. These children still need adult guidance and control. They are not yet ready to handle their own lives. They have a father who loves and cares for them. He has made a gallant effort to again become a part of their lives. Their father is not a perfect man; he has deficiencies. He needs to be more flexible and willing to accept help and direction.

There is not clear and convincing evidence these children will suffer harm if returned to the father. We determine these children should remain children in need of assistance. We remand to the trial court to make such orders as are necessary to assure the children are returned at an early date. The trial court should make such further orders as are necessary to assure that the father and

children continue to receive counseling to assist in the transition.

REVERSED AND REMANDED.

Schlegel and Habhab, JJ., concur; Donielson, P.J., dissents.

Even though our proceedings are de novo, the findings of fact of the juvenile court are entitled to considerable weight. In Interest of Dameron, 306 N.W.2d 743, 745 (Iowa 1981). The juvenile court has the advantage of hearing and observing the witnesses first hand before making this difficult determination. Under the facts of this case, I would affirm the trial court.

Our primary concern is the best interests of the children. We look to the children's long-range as well as immediate interests. Id. The parent's past performance may provide insight for this determination as it is indicative of the quality of the future care the parent is capable of providing. Id. Our statutes are designed to prevent probable harm to a child. Id.

The facts of this case reveal that the father has been offered the help of many programs and services. However, the father has been unable to improve his abilities as a parent. A strained relationship exists between the father and his children, and they are unable to communicate. Regardless of whether the State or Department of Human Services most recently is to blame for this, the problems initially arose because of the parents' inability to properly care for their children. Putting the children back in the father's home will only create more turmoil in the children's lives.

It is true that living happily ever after in an adoptive home may be in a dream world. However, expecting the father to change to be more flexible and willing to accept help and direction may also be wishful thinking. To this date, the father has not demonstrated an ability to care for these children despite his recent gallant efforts in the courts.

The best interests of the children requires that their physical, mental, and emotional needs be met. Even though terminating the father's rights does not guarantee that the children will be happy, it does ensure that no future harm will be done to them by this man. Clear and convincing evidence supports termination of the father's rights. Therefore, I would affirm the decision of the trial court.