

IN THE COURT OF APPEALS OF IOWA

No. 2-439 / 92-401

FILED

DEC 29 1992

CLERK SUPREME COURT

IN THE MATTER OF S.N., S.N., and A.N., Minor Children,
S.W.N., Father,
Appellant.

Appeal from the Iowa District Court for O'Brien County,
Cameron B. Arnold, District Associate Judge.

The father appeals the juvenile court's termination of
his parental rights to his three minor children. **REVERSED
AND REMANDED.**

Steven C. Pals of Clay, Veldhuizen, Bindner, DeJong &
Pals, Orange City, for appellant.

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

Larry G. Postma, Sheldon, guardian ad litem for minor
children.

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

SCHLEGEL, J.

The father appeals the juvenile court's termination of his parental rights to his three minor children. He claims the court erred in (1) finding that placement of the children in his care would not be in their best interests and (2) finding clear and convincing evidence indicating his children could not be returned to his home. The mother's parental rights were also terminated, but she has dismissed her appeal of the juvenile court's order.

S.N., S.N., and A.N. are the natural children of J.N., the children's mother, and S.W.N., the children's father. The children were born on November 19, 1987; May 14, 1989; and November 12, 1990, respectively. On August 7, 1990, the juvenile court adjudicated S.N. and S.N. to be in need of assistance on the grounds the children had suffered or were likely to suffer harmful affects as a result of conditions created by their parents. On December 4, 1990, the juvenile court adjudicated A.N. to be in need of assistance on the same grounds.

On April 15, 1991, the State filed a petition for the termination of J.N.'s and S.W.N.'s parental rights to S.N. and S.N. On August 29, 1991, the State amended its petition to include the termination of their parental rights to A.N. as well. The State pleaded the termination pursuant to Iowa Code section 232.116(1)(g) (1991).

S.W.N. was born April 28, 1961. At the age of seventeen, S.W.N. suffered a serious head injury in an

automobile accident which resulted in the removal of a portion of his frontal lobe. S.W.N. now suffers from diminished judgment, impulsiveness, and a decreased mental capacity. He is currently employed and is described as a good worker.

On February 10, 1992, the juvenile court terminated J.N.'s and S.W.N.'s parental rights to the three children. While stating that it was clear S.W.N. loves his children, the court found the children could not be protected without the termination. The court found the children to be behind in their developmental and social skills and found S.W.N. was incapable of aiding the children's development. S.W.N. appeals.

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 primary concern in termination 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).

In In re J.W.D., 456 N.W.2d 214 (Iowa 1990), the court stated:

"[M]ental disability, standing alone is not a sufficient reason for the termination of the parent-child relationship, but it is a contributing factor to the inability to perform the duties of a parent." (Citation omitted.) Thus, mental disability is a proper factor to consider in determining whether a child is neglected to the point where his or her interest and welfare require termination. (Citation omitted.) [T]ermination [is] appropriate when the disabled parent lacks the capacity to meet the child's present needs as well as the capacity to adapt to the child's future needs. Iowa Code section 232.116(2)(a) states that in considering a termination of parental rights such consideration may include whether the parent's ability to provide the needs of the child is affected by the parent's mental capacity or mental condition.

Id. at 218.

The juvenile court concluded the State had established by clear and convincing evidence that the children cannot be returned to or placed in the custody of their father, S.W.N., in accordance with Iowa Code section 232.116(1)(g) (1991). While the record contains evidence supporting such a conclusion, we do not find this disposition to be suitable to the best interests of the children in this case. Admittedly, the record does reveal S.W.N.'s mental capacity is diminished as a result of his tragic automobile accident in 1977. S.W.N. has undergone organic brain

testing which has revealed frontal lobe damage resulting in emotional instability, inflexibility, and impulsive behavior. S.W.N.'s understanding of reality is limited, and he does occasionally exercise poor judgment. These deficiencies cannot be overcome with education, training, or medication.

In addition, the record contains evidence that S.W.N. has had difficulty complying with the department of human services' case plan to correct the problems which resulted in the loss of custody. Such a failure can be considered evidence of S.W.N.'s inability to recognize and correct these problems. See In re J.L.P., 449 N.W.2d 349, 352 (Iowa 1989). Finally, the record illustrates the children experienced cognitive, social, and emotional deficiencies prior to the time custody was transferred from S.W.N. to the department of human services; the record reveals the children's development has begun to improve since their placement in foster care.

While all of these factors, considered congruently, indicate S.W.N. lacks the mental and emotional capacity to meet the children's present and future needs by himself, we firmly believe S.W.N.'s continued relationship with the children is an imperative part of these children's proper development. The record is replete with compelling evidence of the love existing between S.W.N. and his children. The testimony at trial reveals the children enthusiastically anticipate visitation with S.W.N., show

him appropriate affection, and enjoy their time with him.

Similarly, S.W.N. looks forward to these visits, attends the visits regularly, plays appropriately with the children, and enjoys his time together with them. The older children run to S.W.N. and cling to him. S.W.N. affectionately reads to the children, and he feeds them. S.W.N. has even attended to the responsibilities of changing the children's diapers.

In light of this evidence and the compelling circumstances surrounding this case, we firmly believe the children's best interests will be served by continuing long-term foster care and granting S.W.N. supervised visitation rights to the children. We have reached this conclusion in accordance with the underlying philosophy of Iowa Code chapter 232 as stated in Iowa Code section 232.1 (1991): "This chapter shall be liberally construed to the end that each child under the jurisdiction of the court shall receive . . . the care, guidance, and control that will best serve the child's welfare and the best interest of the state." (Emphasis added.) See also Rosemary Shaw Sackett, Terminating Parental Rights of the Handicapped, 25 Fam. L.Q. 253 (Fall 1991):

In deciding whether or not to terminate the parental rights of a handicapped parent, a judge is forced to face a series of extremely difficult questions. Does terminating parental rights and eliminating the handicapped parent from the child's life solve the problem? Does termination of parental rights afford a better solution than providing assistance to the parent to care for the child? Does termination of parental rights provide a better solution when, even with

assistance, the biological parent-child relationship will not meet what society perceives to be an acceptable parent-child relationship? At what point in time should the parental rights be severed?

The judge, in performing the major surgery of severing parental rights, totally cuts away the unsuitable parents. The judge is aware that once the legal ties to the unsuitable parent are cut, the child's relationship with the parent or parents is over. This legal act does not, however, guarantee the child will have no further need for the natural parents, and no further need for the biological ties of the parents. It also cannot guarantee that the child will have no further need for the biological ties of any siblings or extended family. Nor does a termination of parental rights terminate a child's need for the psychological ties he or she has developed with his or her biological family.

Id. at 281-82.

Additionally, the information we have, pointing to problems with adoption and removal from parental homes, pinpoints a need to seek ways to assist handicapped parents in maintaining parental relationships with their biological children. . . . [Courts] should give significant attention to these factors in assessing issues of parental termination.

Id. at 284.

Having carefully considered the record in the instant case, we decline to terminate the parental rights of S.W.N. with regard to S.N., S.N., and A.N. We firmly believe these children's best interests will be served by continuing long-term foster care and extending supervised visitation rights to S.W.N. Accordingly, we remand this case to the juvenile court for the purpose of determining an appropriate supervised visitation schedule for S.W.N. and his three children.

REVERSED AND REMANDED.

Oxberger, C.J., concurs; Habhab, J., specially concurs.

HABHAB, J. (specially concurring)

It is with considerable concern and hesitation that I join the majority in the result announced today. I am concerned because although we have decided not to terminate the parental rights of the father, we have by judicial decree placed these three children, now five, three, and two years of age, in long-term foster care with supervised visitation rights by the father. If I read the majority opinion correctly, the father is unable to meet the children's present and future needs; thus they are in limbo and may never be returned to his home. To compound the problem, the mother's parental rights were terminated and she does not challenge that ruling.

I hesitate to join the majority because it places too much emphasis on the father's handicap and not enough on the apparent bonding that exists between the father and his children. As for me, it is the bonding between the father and his children that tips the scale in favor of not terminating his parental rights.

I, of course, agree that the needs of the handicapped are special and that those agencies of government that are vested with the responsibility of uniting families must exercise special effort insofar as the handicapped are concerned. I also adhere to the obvious principle that mental disability, standing alone, is not a sufficient reason to terminate a parent-child relationship.

But I am concerned with any reference in the majority opinion that would deny a child loving and caring parents through adoption because of the fear of severing biological ties. This is not to say that where bonding exists between the child and his or her biological parents that the severance of biological ties should not be taken into consideration. It should. But surely where there is no biological bonding, it is better to proceed with adoption than it is to place a child in a foster home.

Foster care, although important, is no longer regarded as the best solution for children whose parents are unable to care for them. I believe that reunification of the natural family or adoption of a child by a new family has replaced foster care as the preferred solution. Thus, where a child has been placed in foster care and there is a lack of bonding between the child and his or her biological parents, adoption to a new and permanent home is a much preferred solution to a lifetime in foster care.