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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-502 / 89-883

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

J.L., Father,

Appellant.

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Appeal from the Iowa District Court for Scott County, John G. Mullen, District Associate Judge.

Father appeals the termination of his parental rights. **MODIFIED.**

Stephen W. Newport, Davenport, for appellant father.

Thomas J. Miller, Attorney General, Gordon E. Allen, Deputy Attorney General, and Charles Phillips, Assistant Attorney General, for appellee State.

Vincent Motto, Davenport, guardian ad litem for the child.

Heard by Donielson, P.J., and Sackett and Habhab, JJ. but decided en banc.

SACKETT, J.

This is an appeal by a black father from a trial court order terminating his parental rights to a daughter born in 1986. The child's mother is white. The father contends the removal of the child was racially motivated. He contends the State predetermined he would not comply with the plan to reunite him with his daughter and the State failed to show by clear and convincing evidence his parental rights should be terminated. He also contends the State's plan, which will result in the child being adopted by white parents, will result in the child losing racial identity.

The father and mother of this child never married. They lived together prior to and for a year following the child's birth. On May 7, 1987, at about 5:30 p.m., there was a fire in their home. On May 8, at about 4:30 p.m., the child and her half-sister by her mother, who had also been living in the home, were placed in foster care. The natural mother suffered from epilepsy. She did not take her medicine as prescribed. The home fire occurred when she had a seizure while cooking.

On May 12, 1987, a petition was filed asking that the child be found a child in need of assistance, because she was denied critical care due to her mother not taking her medication. There were no allegations of denial of critical care by appellant father.

On August 4, 1987, an adjudicatory order was filed. There were no factual findings in the order, only a determination finding the child was a child in need of assistance under Iowa Code section 232.2(6)(c)(2). On May 10, 1989, following the filing of a petition for termination of parental rights, the parental rights of both parents were terminated. Only the father appeals.

The issue is, was the father treated fairly, and is there clear and convincing evidence the child cannot be returned to him? The issues surrounding removal dealt exclusively with the mother's failure to take medicine. There is little evidence relating to the father's care of the child prior to removal. The State does not contend the father has abused his child or failed to provide for her needs while in her custody.

The State points to (1) earlier charges of abuse by this father to other children, (2) his early resistance to services, and (3) his history of drug and alcohol use. The State acknowledges he sought treatment and counseling, some of which was successful.

The older stepchild had been determined a child in need of assistance, apparently because appellant used inappropriate methods of discipline. However, the worker assigned determined the child could be adequately protected if she remained in the home. Additionally, another child this father had out of wedlock was apparently sent by its

mother to be cared for by this father. The child was subsequently put in foster care after appellant hit him. The facts in the record as to both of these incidents are very sketchy and insufficient for us to find appellant injured either child.

The father received Aid to Dependent Families for the child, and the record reflects that during the child's first year of life the father assumed responsibility for seeing the child had food, care, and lodging. He was upset with the mother for not having taken her medication.

After removal, the father embarked on a course of conduct designed to obtain custody of his daughter. He had treatment for substance abuse, went to domestic abuse counseling, and received counseling from a family life specialist. On March 22, 1988, the family life specialist who had worked with him since September 12, 1986, reported he was responsible and caring. However, several months later his contacts with his daughter stopped. On November 16, 1988, the State filed the petition for termination of parental rights.

There is evidence the father has a series of faults, including erratic behavior, inability to maintain stable employment, use of alcohol and marijuana, and use of cocaine prior to the child's birth. This is an extremely difficult case. There is virtually no evidence showing appellant has failed to properly parent his daughter while she was in his

care. He received financial assistance and provided for her needs.

This child and her half-sister have been put in a prospective adoptive home with relatives of the child's mother, where they are well established. Like the mother, the prospective adoptive parents are white. The children are close. At least on the surface, the child may have a chance for a better home in the adoptive home. But this is not the issue.

Appellant contends he has not had a "fair shake" in the system and he blames it, at least in part, on the fact he is black. He also contends, as a black person, treatment programs designed for whites don't work. We recognize we must demand sensitivity to racial and cultural differences by the State when it works on family issues. We recognize also that a father, although not married to a mother, has a right to his child, particularly where, as here, the father was a caretaker of the child. See Stanley v. Illinois, 405 U.S. 645, 651-52, 92 S. Ct. 1208, 1213, 31 L. Ed. 2d 551, 559 (1972).

There is no showing of an effort having been made to provide services to allow the child to remain in the home. Iowa Code section 232.102(4) provides wherever possible the court should permit the child to remain at home. There is a rebuttable presumption the best interests of children are

served when custody remains with their natural parents. In re Chad, 318 N.W.2d 213, 218 (Iowa 1982); see also In re M.H., 444 N.W.2d 110, 112 (Iowa App. 1989).

Had the State recognized the position of this father prior to removal, and made an effort to identify limitations on his ability to parent, perhaps services could have been offered in the home and removal of the child may not have been necessary. It is reasonable to assume parenting skills can more easily be improved by allowing the child to remain with the parent than by removing the child from the home and limiting contact between parent and child.

Appellant contends he has been treated in a racially discriminatory manner. In assessing issues of parenting, we must be sensitive to the culture of a person or their family, and understand parents and children in the context of their family and community, in order to plan and offer effective services. See Minority Concerns and the Family-Based Approach to Care, Prevention Report (Spring 1982).

While sometimes, perhaps because of our small minority population, we may lack sufficient sensitivity to these issues, we do not find the problem here to be one of racial discrimination toward the father. But we still must examine the evidence to determine whether there is clear and convincing evidence this child cannot be returned to her father. Parental rights cannot be terminated unless we find

clear and convincing evidence to support the finding. In re K.L.C., 372 N.W.2d 223, 227 (Iowa 1985). The trial court has found there is such evidence.

While our review is de novo, we give weight to the findings of fact made by the trial court, especially when considering the credibility of witnesses. In re W.G., 349 N.W.2d 487, 491 (Iowa 1984). The most damaging evidence to the father is the fact that he did not visit the child for about a six-month period. The record demonstrates some of the workers involved with this case feel the child will be better off if adopted. However, the fact that the child may lose her black identity if the termination is affirmed and the child is adopted by a white family is particularly troubling.

We recognize there is strong evidence that adopted children may suffer as a result of the severance of their biological ties, and, even in the most satisfactory adoptive home, may suffer emotionally from the severance of those ties. See Beyer & Mlyniec, Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence, 20 Fam. L.Q. 233, 237 (1986) (citing Colon, Family Ties and Child Placement, 17 Fam. Process 289 (1978); Teddy, Creative Cooperation Involving Biological Parents in Long Term Foster Care, 61 Child Welfare 53 (1986); Litner, Some Traumatic Effects of Separation and Placement (1976)). This problem may be even more serious when the child does

not have racial identity with his or her adoptive parents. Issues of loss of racial identify because of adoption are issues that have not been addressed by the Iowa courts. There is testimony here the child needs to maintain her identity with black culture. We recognize children should be allowed to do so. We feel the trial court has recognized this issue because it allowed visitation to continue between the father and the child during the pendency of this appeal.

There is not clear and convincing evidence this child cannot be returned to her father. Additionally, the proposed adoption would cut the child off from her racial identity. Because her color causes her to be looked upon more as a black than as a white, this is important. We reverse the order terminating the father's parental rights. The child shall remain a child in need of assistance. Assistance should be offered to the father to help him make a home for the child.

MODIFIED.

All judges concur except Habhab, J., and Donielson, P.J., who dissent.

HABHAB, J. (dissenting)

I respectfully dissent. In doing so I do not take issue with the discourse of the majority. In fact, I agree for the most part with their analysis of the law. In addition, I agree that in assessing the issues of parenting it is necessary that we be sensitive to the culture of a person and their family and that we understand parents and children in context of their family and their community in order to plan and offer effective services. See Minority Concerns and the Family-Based Approach to Care, Prevention Report (spring 1982). I disagree, however, with the majority's conclusion that there is not clear and convincing evidence that the child cannot be returned to her father.

As the majority points out, the father and the mother of this child were never married. They did live together for the first year of the child's life. The child, a girl, was born in May 1986.

In May 1987 when this child was slightly under a year old, she was removed from her parents' home on an emergency basis. The child was adjudicated to be a child in need of assistance and was placed in foster care. The child has been in foster care since the date of her emergency removal.

The juvenile court, relying on Iowa Code section 232.116(1)(e) terminated the parental rights of both

parents. That section of the code permits termination if a child has been adjudicated a child in need of assistance, has been in foster care for twelve of the last eighteen months, and cannot be returned to her parents' home.

There is not much question the first two conditions of section 232.116(1)(e) have been met. The only question remaining is whether the child can be returned to her parents' home.

In this respect, the mother has not appealed the termination order. Thus, we need not consider the merits of her case. The father, however, has appealed, and so we must look to the record to determine if there is clear and convincing evidence that the child cannot be returned to him. The juvenile court held that she could not, and I agree.

In May of this year the child will be three years of age. Except for the first year of her life, she has been in foster care. While in foster care, her mother would go for months without visiting her and without contacting her social workers. The father's visitation was a little better, but the record substantiates that it was inconsistent and sporadic.

The father has a long history of alcohol and drug abuse. Social workers testified he has not resolved these problems; a period of apparent improvement turned out to be illusory, and the father is believed to have repeatedly

falsified about his sobriety. In addition, the father has a violent temper; he is believed to have physically abused two of this child's half-siblings, although there is no evidence that this child has ever been physically abused. The father has trouble maintaining either a job or a stable residence. As the majority points out, the father did not visit his child for about a six-month period.

There is evidence in the record that the older stepchild was determined a child in need of assistance because the appellant used inappropriate methods of discipline. Additionally, another child of the appellant had out of wedlock was sent by its mother to be cared for by the appellant. The child was subsequently put in foster care after appellant struck him.

In resolving the issue presented in this case, we exercise de novo review, keeping in mind our paramount concern is the welfare and best interests of the child. In re D.L., 401 N.W.2d 201, 202 (Iowa 1986). In this respect, we give weight to the findings of fact of the juvenile court, especially when considering the credibility of witnesses, but of course we are not bound by those determinations. 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).

Central to the determination of this type of case is

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a child. In re Dameron, 306 N.W.2d 743, 745 (Iowa 1981). The State has a duty to see that every child receives minimally adequate care and treatment and will intercede when parents abdicate their responsibility.

This child and her half-sister have been put in a prospective adoptive home with relatives of the child's mother, where they are well-established. The children are close. Our supreme court and our court have held a number of times that a child should not be forced to endlessly suffer the parentless limbo of foster care. Long v. Long, 255 N.W.2d 140, 146 (Iowa 1977). The child here should not endlessly await the maturity of her natural parent. In re T.D.C., 336 N.W.2d 738, 744 (Iowa 1983).

As I previously noted, a child's best interest is central to the termination of parental rights. See In re Dameron, 306 N.W.2d at 745. In this regard, we consider what the future holds for the child if returned to his or her parents. Id. Essential to the evaluation of a child's best interests is an examination of the parents' past performance, from which valuable incite may be gleaned as to the future quality of care the parents are able to provide. In re O'Neil, 303 N.W.2d 414, 423 (Iowa 1981). The past behavior of the parent is an important factor to be considered by the court. In re M. H., 367 N.W.2d 275, 278 (Iowa App. 1985). The Iowa statutory termination provisions are preventive, as well remedial. In re

Dameron, at 745. They are designed to prevent probable harm to a child. Id.

Upon my review of the record, I agree with the juvenile court's conclusion that the child cannot be returned to J.L.'s custody. I would affirm.

Donielson, P.J., joins this dissent.