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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-501 / 89-1939

IN THE INTEREST OF S.L. and **B.L.**, Children,

R.L., Father,

Appellant,

L.L., Mother,

Appellant.

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Appeal from the Iowa District Court for Buena Vista County, Mary L. McCollum, Juvenile Referee.

Both parents appeal the juvenile court's direction for continued foster care on a permanent basis. **REMANDED WITH DIRECTION.**

James A. Schall, Storm Lake, for appellant father.

James W. Gailey, Newell, for appellant mother.

Hugh J. Perry, Storm Lake, guardian ad litem for the children (appellee).

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

Heard by Schlegel, P.J., and Hayden and Habhab, JJ.

HAYDEN, J.

This case involves two children, a girl born in September 1976 and a boy born in September 1978. The father met the mother, a native of China, while on a tour of duty in Vietnam. They had two children while still in Vietnam. After their arrival in the United States, the two children who are the subjects of this proceeding were born.

The parents' marriage was dissolved in 1982. The dissolution decree placed the children in their father's physical care. (The two older children, now adults, were also placed in the father's custody.)

In approximately 1985 the father took a job which required out-of-state travel. He asked the mother to assume the children's care on a temporary basis. The two younger children came to live with their mother in June of 1986.

In March of 1987 the mother went to Alaska to help her oldest daughter, who was experiencing a difficult pregnancy. She contacted the Department of Human Services (DHS) before she left and informed them of her plans. She left the children in the care of her boyfriend and her older daughter and apparently another woman whose identity is not shown in the record.

The police were called in her absence with a report the children were unsupervised. When the police arrived, they found the boyfriend passed out drunk on the couch. The children were removed and placed in emergency foster care.

Shortly thereafter, the two youngest children were adjudicated to be children in need of assistance (CHINA) and placed in foster care.

The two children in this case are twelve and fourteen years of age. The boy, twelve, has been consistently reported to be very well-adjusted and normal. The girl, fourteen, has had some serious problems and apparently these continue. The roots of the girl's problems apparently stem from witnessing the sexual abuse of her older sister by her father. Report of this sexual abuse has been founded.

At the CHINA proceeding and subsequent dispositional hearing the father was ordered to get counseling and the mother a substance abuse evaluation. These orders apparently were not obeyed. Also in the CHINA hearing, the juvenile court noted: "[The mother] tries to cooperate. She provides good meals and a clean home for the children."

In March of 1985 a founded report of physical abuse by the mother's boyfriend was made. However, the mother no longer lives with the boyfriend. The mother was ordered to get a substance abuse evaluation for alcohol, which she apparently failed to do. Additionally, she appears to have problems communicating clearly with DHS workers, possibly due to the language barrier. The mother, being a native Chinese, does not read or write English.

In September of 1988 the mother moved to Alaska, where she presently lives in a two bedroom apartment and works

full time. The mother has contacted the Alaska Department of Human Services. However, the Iowa DHS has never made any attempt to contact its Alaskan equivalent. Additionally, the mother has flown back to Iowa at considerable expense to herself to be present at each hearing since the original dispositional order was entered in April of 1987.

There is a founded report the father sexually abused an older sister on repeated occasions. Additionally, he allegedly physically abused the children and their mother during the marriage and failed to maintain any control and discipline over the children while they were in his custody after the dissolution. In addition, the father had a serious and untreated alcohol abuse problem.

The children have been in foster care continuously since 1987. During that time, they have been moved to five different foster homes.

In 1988 the state filed a petition to terminate the parental rights of both parents. However, the juvenile court dismissed this termination petition. The juvenile court found statutory grounds for termination existed but termination should be avoided due to the children's emotional bonds to their parents and to an older sister. In lieu of termination, the juvenile court scheduled a "permanency hearing."

The DHS did not conduct a home study for either parent prior to the hearing to determine if either home was fit for the children.

Following the "permanency hearing," the juvenile court issued an order directing permanent foster care for both children. Both parents, acting separately, have appealed this order. The parents challenge the sufficiency of the evidence to warrant the permanent foster care directed by the juvenile court. Each parent argues the children should be placed with him or her.

Appellate review of an order arising out of a child in need of assistance proceeding is de novo. In re Blackledge, 304 N.W.2d 209, 210 (Iowa 1980); Iowa R. App. P. 4. We give weight to the findings of fact of the juvenile court, especially when considering the credibility of witnesses, but are not bound by those determinations. Iowa R. App. P. 14(f)(7).

The primary concern in juvenile care 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). Although the remedy asked for in this proceeding is not quite as severe as a termination, the effect of a permanency adjudication will be virtually the same. Thus, we are guided by similar principles.

> 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 to Dameron, 306 N.W.2d at 745); see also In re A.C., 415 N.W.2d 609, 613 (Iowa 1987).

In our review of the record, we note little negative conduct is ascribed to the mother. A picture emerges from the record of a shy, somewhat confused and disoriented mother of foreign origin, language, and culture. Further, the record reflects she loves and cares for her children. In fact, she went to Alaska at considerable expense to herself when one of her children was experiencing a difficult and traumatic pregnancy.

There is no allegation of abuse of any sort by the mother. The juvenile court found "[The mother] tries to co-operate. She provides good meals and a clean home for the children." Other than the one time the police found her boyfriend sleeping on the couch, there does not appear to be a serious problem with unsupervised behavior. Even then, the main problem appears to be the boyfriend was drunk while he slept.

The mother went to Alaska to help her daughter. In doing this she showed herself a conscientious and caring parent. Apparently while she was there she made a connection which enabled her to move to Alaska in 1988. She works a permanent, full time job in a dignified position. She has never been on Aid to Families with Dependent Children (ADC). She has shown herself to be a responsible citizen. Far more than what appears in the

record should be required before we condone the permanent removal of children from their parents and direct the State to assume responsibility for the parental function. The State and its foster care system may be able to provide the basic necessities, but it can never substitute for a kind and loving parent.

> [T]he superior parenting ability of a foster parent as compared with that of the natural parent is not entitled to great weight unless the foster parent plans to adopt the child. This is not the case here.
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> > ...Presumably every foster home will provide good care. The parent's right to have a child returned, however, is not measured by comparing the parent's home to the foster home or an ideal home. Rather the parent's right is established by negating the risk of reoccurrence of harm.

In re S.J., 451 N.W.2d 827, 831 (Iowa 1990) (quoting In re Blackledge, 304 N.W.2d 209, 214-15 (Iowa 1981).

The Iowa DHS has placed a heavy, and we believe, impermissible burden on the mother. In its brief, the State, representing the DHS's interests, writes: "Despite knowing that living in Alaska makes reunification and communication with the children difficult, she has chosen to continue living there." The briefs and records reflect it is the DHS's continuing position the mother should move back to Iowa before it will favorably consider placing the children with her. We observe Alaska is a member of the Union and operates under similar guidelines as Iowa. It appears the DHS is holding the children to force the mother's return to Iowa.

The DHS admits it has made no attempt whatsoever to contact the Alaska DHS. In fact, in oral argument counsel admitted the DHS was placing the full responsibility for contacting the Alaska DHS on the mother. According to the DHS, the mother's failure to make all the necessary arrangements is further proof of her unfitness to parent.

The DHS failed to conduct a home study of either parent in this case. The department's position is the home study is the responsibility of the parents. At least two of the State's expert witnesses recommended foster care without ever talking to the mother or seeing her home.

There are few negative reports on the mother. There is a lack of evidence of any detrimental effects on the children from staying with her. The mother only had custody of the children for ten months. This is not enough time to justify the children's permanent removal from their parental home. The progress reported by the department in the girl's behavior in foster care appears to this court to be at least as much related to being away from the father and accompanying sex abuse as to any other factor. In fact, this may well be the main reason behind the girl's improvement.

The strength of the DHS's case rides on the length of time the children have been separated from the mother. However, during that time they have been moved to five different foster homes. This is not sufficient stability for these children. The juvenile court dismissed the

termination petition because of the strong bonding between parents and children. Thus, these children cannot be placed for adoption. They will remain in the state's foster system until they are eighteen. At that point, all support systems will evaporate.

The only harm complained of against the mother is inadequate supervision. The record provides a basis only for emergency removal from the home during the mother's initial two-week trip to Alaska. After her return, it appears they should have been returned to her. She did not seek a review hearing to regain custody. However, we are authorized in this permanency hearing to make a dispositional order in the best interests of the child. We may return the children to their parent. Iowa Code § 232.104(2)(a).

This case has much in common with In re Blackledge, 304 N.W.2d 209 (Iowa 1981). In that case a mother, also a war bride from Vietnam, sought to regain custody of her children. Id. at 210. Like the mother in this case, she had experienced personal problems adjusting to life in a new culture without the husband who had married her and taken her from her homeland. Id. Also like the mother in this case, she was a good housekeeper and loved her children. Id. at 211. Again like this case, she sought the help of the DHS when things were rough. Id. at 210. The juvenile court felt the foster care was better than the mother's. Id. at 214-15. In Blackledge, the Iowa Supreme

Court held this comparison was impermissible. It remanded the case to the district court for further findings with a strong inference unless more egregious abuses were found, the children were to be returned to their mother. Id.

The Iowa legislature has declared the public policy preference for children to be placed in the home of their parents. Iowa Code § 232.1. The clear and convincing standard must be met before a permanent foster care order may be entered. Iowa Code § 232.104(3). In our de novo review, we determine that standard has not been met. However, we believe further information is necessary before a final adjudication is possible.

We remand this case to the juvenile court to enter an order directing the DHS to conduct home studies of both the mother and the father. The DHS shall contact its equivalent organization in the respective states pursuant to the Interstate Compact on Placement of Children or other appropriate authority. See Iowa Code § 232.158.

The juvenile court shall hold a hearing to consider the results of the home studies and any other evidence pertaining to the present condition of the parties. In light of this new evidence, the juvenile court shall rule anew on the permanency petition. See Blackledge, 304 N.W.2d at 215. This hearing is to be carried out as expeditiously as possible. These children have already been separated from their mother for over two years. It is imperative for the sake of the children to conclude this

matter as soon as possible. Any adversely affected party may appeal the juvenile court's new ruling.

REMANDED WITH DIRECTION.