

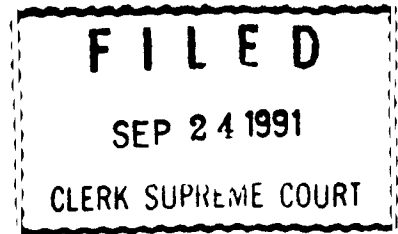
IN THE COURT OF APPEALS OF IOWA

No. 1-367 / 91-675

IN THE INTEREST OF C.T., C.T., and P.T.,
Minor Children.

C.T., Father,
Appellant.

447



Appeal from the Iowa District Court for Linn County,
Patrick R. Grady, Juvenile Court Referee.

The father appeals the termination of his parental
rights. **AFFIRMED.**

Mark C. Meyer, Cedar Rapids, for appellant.

Bonnie J. Campbell, Attorney General; John M. Parmeter,
Special Assistant Attorney General; and Kathrine S.
Miller-Todd, Assistant Attorney General, for appellee.

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

HABHAB, J.

The father and mother involved in this termination case were married in April 1984. They had two daughters and a son ranging in age from six to four at the time of the termination proceedings. In May 1988, the mother left the father and the three children. The parents were divorced on March 3, 1989. In November 1989, the father requested emergency foster care because he was unable to cope with the demands of his children. At this time, he was referred to mental health and substance abuse treatment, and homemaker agencies. However, he did not use the services of these agencies. The father only had sporadic visitations with his children, although weekly unsupervised visitation was available.

An adjudicatory hearing was held on December 28, 1989. All parties stipulated that the children were in need of assistance. The children continued in foster care placement. On January 5, 1990, the father called the Department of Human Services (DHS) and advised the social worker he was employed full-time and attending school full-time. The father did not attend the dispositional hearing held on January 29, 1990. He did not contact DHS again until March 26, 1990, eleven days after he had been arrested. The father testified that his full-time employment and full-time school attendance lasted two weeks. It ended because he was drinking. He was also using marijuana and cocaine. This led to a series of

crimes that resulted in his incarceration. He did not visit his children because of outstanding warrants for his arrest.

The father was sentenced to a six-month term at a community correction center. However, during this time, he did not attend homemaker services or receive treatment for substance abuse.

Between July 10, 1990, and December 31, 1990, DHS did not hear from the father. The father did not contact the children by telephone or mail during that period of time. He did not acknowledge the children's birthdays.

On August 4, 1990, the father was again arrested after a high speed chase. He was charged with various traffic offenses, including operating a motor vehicle while intoxicated, driving while barred, and attempting to elude officers. It appears he was also charged with theft. He was subsequently convicted of operating while intoxicated, third offense and second-degree theft. He was sentenced to two consecutive five-year terms. At this time, DHS did not know where the father was, although the father claims that he advised them of his incarceration.

DHS finally located the father at the Mt. Pleasant Medium Security Unit. The father was sent a release for information to sign and return in order to facilitate communication between DHS and the father. He never returned the release.

A termination hearing was held while the father was still in prison. He claims he expects to be paroled in August. He also claims he has attempted to obtain substance abuse treatment in prison, but that none was provided to him up to the time of the hearing.

The father has a long-standing substance abuse problem. Before his current incarceration, he repeatedly refused or failed to obtain recommended substance abuse treatment.

After the hearing, the district court determined the statutory prerequisites for termination were established. The court found the father's current imprisonment would make it impossible for the children to receive adequate care. The children could not be returned to the custody of the father without continuing to be in need of assistance. The court reasoned when the father is released from prison, he would require several months of further rehabilitation and parenting skills development. The father's history of substance abuse created a risk he could not provide adequate care for the children. The court terminated the father's parental rights.

The father appeals the termination of his parental rights. The mother voluntarily relinquished her parental rights. She is not involved in this appeal.

On appeal, the father alleges his due process rights were violated by the juvenile court's consideration of his incarceration and by the State's failure to provide him

with substance abuse treatment. He also contends incarceration is a statutory exception to the parental absence standard of Iowa Code section 232.116(1).

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

I. Due Process.

The father argues his due process rights were violated by an alleged mandatory presumption. The supposed presumption is: If a person is incarcerated, their

parental rights should be terminated. We can and do immediately place at rest any suggestion that such a presumption exists under our judicial system. Without hesitation we unqualifiedly reject that suggestion and find it non-existent. In addition, we find the trial court did not apply the suggested mandatory presumption.

Iowa Rule of Appellate Procedure 14(a)(5) requires specific information concerning scope of review and error preservation in each division of every brief. The father does not indicate the due process argument has been preserved for appellate review. We are unable to locate in the record where error had been preserved. Constitutional questions raised on appeal for the first time are too late. In the Interest of Robbins, 230 N.W.2d 489, 494 (Iowa 1975); Long v. Long, 255 N.W.2d 140, 144 (Iowa 1977).

Even if D.P.'s arguments were preserved, the father's position is not supported by the record. The record reveals that no bond could be seen between the children and their parents. During their stay in foster care, the children have rarely spoken of their parents. For at least fifteen months, the father has seldom been in contact with the children. Between January 1990 and April 1991, he saw them only four times. He had no contact with them at all between July 10, 1990, and December 31, 1990.

The father has a substance abuse problem. He has committed several crimes, apparently in connection with the substance abuse. The father did not seek the necessary

treatment for his substance abuse problem. In his appellate brief, the father repeatedly blames the State for not providing him with substance abuse treatment. Our review of the facts shows the father did not take advantage of the opportunities offered. We are led to conclude the father continues to deny his own personal responsibility for his plight. He seeks to put the blame elsewhere, thereby excusing his own criminal behavior and his continuing substance abuse problem.

Although it is not our place to pass moral judgment, it is the function of this court to intervene when a parent's overall lifestyle is harmful to a child's best interests. See In re Rice, 236 N.W.2d 40, 43-44 (Iowa 1975).

The father's prolonged substance abuse problem, his criminal behavior, and his overall failure to accept personal responsibility for his problem combine to support termination of the father's parental rights. The incarceration is simply another supporting reason for the termination.

The children have been well adjusted in foster care. They have no special needs. All the children are capable of forming bonds with a mother and father figure. They are adoptable and need permanency. A foster family has indicated interest in adopting them.

Our primary concern is for the welfare of the child. As we have often said, these children should not be forced to endlessly await the maturity of his father. In re

T.D.C., 336 N.W.2d 738, 744 (Iowa 1983). Termination must occur if the specified time has elapsed since the child was removed from the home and the parent still cannot take care of the child. Id. Evidence of the parent's past performance may be indicative of the quality of future care he or she is capable of providing. In re Dameron, 306 N.W.2d 743, 745 (Iowa 1981).

We determine the father's procedural and substantive due process rights were not infringed by the termination proceedings. We affirm the juvenile court on these issues.

II. Statutory Exception.

We turn to the father's last contention. He claims Iowa Code section 232.116(3)(e) (1991) should insulate him from termination proceedings. (Formerly Iowa Code section 232.116(6)(e) (1985).) That section provides:

3. The court need not terminate the relationship between the parent and child if the court finds any of the following:

* * *

e. The absence of a parent is due to the parent's admission or commitment to any institution, hospital, or health facility or due to active service in the state or federal armed forces.

We have already considered this question. See In re J.V., 464 N.W.2d 887, 890 (Iowa App. 1990). In J.V., we pointed out the section is clearly discretionary, not mandatory. Id. We also interpreted the statute not to include penal facilities under the term "institutions."

Id. We based our reasoning upon other subsections of 232.116, which provide incarceration as a consideration for termination. See Iowa Code § 232.116(1)(i)(2) and 232.116(2)(a) (1991). We find J.V. to be well-reasoned. We continue to abide by its holding.

We determine the juvenile court may consider the father's incarceration as a factor in deciding whether to terminate parental rights. We affirm the trial court on this issue.

The juvenile court is affirmed on all issues. Costs of this appeal taxed to appellant.

AFFIRMED.