

IN THE COURT OF APPEALS OF IOWA

No. 7-882 / 07-1713
Filed November 29, 2007

**IN THE INTEREST OF D.G.-M. and M.M.,
Minor Children,**

**D.G.-M. and M.M., Minor Children,
Appellants.**

Appeal from the Iowa District Court for Polk County, Joe E. Smith, District Associate Judge.

Attorney/guardian ad litem for children appeals district court order dismissing the State's petition to terminate parental rights. **AFFIRMED.**

Kimberly Ayotte of the Youth Law Center, Des Moines, for appellant children.

Angela Gruber-Gardner, Des Moines, for mother.

Aaron Ginkens, West Des Moines, for father.

Thomas J. Miller, Attorney General, Kathrine Miller-Todd, Assistant Attorney General, John P. Sarcone, County Attorney, and Michelle Chenoweth, Assistant County Attorney, for State.

Considered by Vogel, P.J., and Mahan and Zimmer, JJ.

MAHAN, J.

The attorney/guardian ad litem for two children appeals the district court order dismissing the State's petition to terminate their parents' parental rights. Our review is de novo. *In re M.S.*, 519 N.W.2d 398, 399 (Iowa 1994)

I. Background Facts and Prior Proceedings

Since birth, three-year-old M.M. has lived with her mother, Maria, and her step-father, Juan. The whereabouts of her biological father, J.B.H., are unknown. One-year-old D.G.-M. has also spent his entire life with M.M., Maria, and his biological father, Juan.

On January 22, 2007, Juan and Maria were arrested when they sold methamphetamine to an undercover police officer. Because M.M. and D.G.-M. were present at the time of the transaction, both were removed by authorities, placed in foster care, and eventually placed with relatives. Juan and Maria have remained incarcerated ever since.

On March 22 the children were adjudicated children in need of assistance (CINA) pursuant to Iowa Code sections 232.2(6)(c)(2) and (n) (2007). In April Juan and Maria pled guilty to charges related to the drug transactions, and both were sentenced to indeterminate terms of imprisonment.¹ Maria's first parole hearing is scheduled to be in the fall of 2007. Juan's conviction carries a mandatory minimum sentence, so he will not be eligible for parole until July 2009. Both will be deported to Mexico immediately upon their release.

¹ The maximum length of Maria's imprisonment could be ten years, while the maximum length of Juan's imprisonment could be twenty-five years. See Iowa Code §§ 902.3, 902.9.

At the July permanency hearing, the juvenile court ordered the State to institute proceedings to terminate the parent-child relationships. The State promptly filed a petition to terminate the parental rights of all three parents.

At the termination hearing, the court was informed that Maria planned to live with her parents in Mexico once she was released from prison. Documentation from the Mexican equivalent of the Iowa Department of Human Services (DHS) confirmed that both children would have an appropriate home in Mexico with Maria's parents. The bulk of the evidence presented at the hearing centered on the fine job the relatives were doing caring for the two children. The attorney for the State and the attorney for the children/guardian ad litem stipulated that Maria has "a wonderful relationship with both of her children and that she's very bonded [with them]."

After the hearing, the same juvenile court judge who had ordered the State to file the termination petition entered an order dismissing the petition. The court found there were statutory grounds for termination because both children had been removed from their parents' care for more than six months and they were unable to be returned to their care at the time of the proceeding,² but found there was insufficient proof that termination was in the children's best interests. See *M.S.*, 519 N.W.2d at 400 ("Even if the statutory requirements for termination are met, the decision to terminate must still be in the best interest of the children."). The court stated:

² The court found statutory grounds to terminate all three parents' parental rights under section 232.116(1)(h) (child is three or younger, child CINA, removed from home for six of last twelve months, and child cannot be returned home) and additional grounds to terminate J.B.H.'s parental rights under section 232.116(1)(b) (abandonment).

No party, at any time during the course of this case, presented me with any evidence that there would be safety concerns if the children could be placed with their mother. The sole reason for the out of home placement since the very beginning was the parents' unavailability. There is no evidence that Maria abused illegal substances. There is no evidence of poor parenting prior to the conduct that resulted in Maria's arrest. There is no evidence that following her release from prison Maria cannot provide a safe and secure home for [the two children]. Indeed the evidence does establish that Maria would have the benefit of a supporting extended family in Mexico where her oldest child is now in the custody of his maternal grandparents. The Mexican Consulate in Omaha, Nebraska is available to assist the return of the children to Mexico.

. . . .

[T]here is no showing that the children cannot be nurtured and thrive in their mother's custody once she is released. For that reason, I conclude that the children's best interests will be served by continuing them in the [local relative's] custody until their mother is released from prison and then facilitating their return to their mother's custody when she is established in her parents' home.

The court ordered that there be further review in the pending CINA proceedings and continued the current placement with the local relatives.

The attorney/guardian ad litem for the children now appeals, contending termination was in the children's best interests. The State did not file a brief in support of this appeal.

II. Merits

The paramount consideration in termination proceedings is the best interests of the children. *In re C.K.*, 558 N.W.2d 170, 172 (Iowa 1997). In seeking out those best interests, we consider the children's long-range, as well as immediate interests. *Id.* We also look to the parents' past performance because it may indicate the quality of care the parent is capable of providing in the future. *Id.*

Upon our de novo review, we find that there is nothing in the record, beyond her present incarceration for her involvement in the sale of drugs to the undercover police officer, to suggest that Maria would provide anything less than appropriate care for her children. The evidence shows that Maria may be released from prison in the near future and that she has already arranged an adequate place for her children once she is released. We also find nothing in the record to suggest that termination of either father's parental rights would be necessary if Maria was able to resume care for her children.

The juvenile court judge who has presided over the CINA proceedings since their inception found termination was not in the children's best interests because the children were under their relatives' care. Iowa Code section 232.116(3)(a) provides that a court need not terminate parental rights if the children are in the care of a relative. The evidence suggests that the children are thriving in their relatives' care while they wait for the parents' release from prison. Because of the excellent care they are receiving from relatives, the strong bond between the mother and her children, and the fact that both children will remain under the supervision of the juvenile court and DHS through the CINA proceedings, we agree the mere lapse of the time set forth in the statutory grounds for termination does not mandate that termination is in the best interests of these children at this time. However, we also note that the children cannot wait for their mother's release from prison indefinitely. Subsequent termination proceedings may be necessary if permanency is not achieved soon.

Because termination is not in the best interests of the children at this time, we affirm the juvenile court's order dismissing the termination petition.

AFFIRMED.