

IN THE COURT OF APPEALS OF IOWA

No. 0-109 / 09-1825
Filed March 24, 2010

**IN THE INTEREST OF S.K. and J.K.,
Minor Children,**

**A.K. and S.K., Parents,
Appellants.**

Appeal from the Iowa District Court for Jackson County, Arlen J. Van Zee,
District Associate Judge.

A mother and father appeal from the order terminating their parental
rights. **AFFIRMED.**

Stephen W. Newport of Newport & Newport, P.L.C., Davenport, for
appellants.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney
General, Phil Tabor, County Attorney, and Christopher Raker, Assistant County
Attorney, for appellee State.

Stuart Hoover, Dubuque, for minor children.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

DOYLE, J.

A mother and father appeal from the order terminating their parental rights. Upon our de novo review, we affirm.

I. Background Facts and Proceedings.

A.K. is the father and K.K. is the mother of S.K., born January 2001; J.K., born March 2002; D.K., born March 2004; and D.K., born March 2006. The parents' parental rights to the two youngest children were terminated in May 2009.¹ The mother has been diagnosed attention-deficit/hyperactivity disorder (ADHD) and mental retardation. All four children have behavioral problems and have been diagnosed with mental retardation.

The children came to the attention of the Iowa Department of Human Services (Department) in February 2005 after it was reported the home in which the family was residing had garbage on the floors, a kitchen full of dishes with spoiled food, no shower or bathing facilities, and a hot water heater and toilet that were not working. The report was confirmed, leading to a finding of denial of critical care for failure to provide adequate shelter for the children by the parents. In July 2005, there was a finding of denial of critical care for failing to provide proper supervision to the children by the parents after it was confirmed the children had been kept in the yard by the use of an electric fence.

In January 2006, the children were adjudicated children in need of assistance (CINA). The court adopted the Department's case plan and ordered the children to remain in the parents' care. Thereafter, the parents received a

¹ The termination of the parents' parental rights to those children, D.K. and D.K., are not at issue in this appeal.

variety of services designed to correct the conditions leading to the CINA adjudication. However, in August 2006, there was a founded report of physical abuse of J.K. after J.K. had a cigarette burn on his thigh. In December 2007, another report of physical abuse was confirmed to be founded after the father bit S.K. on the arm and left a lasting bruise.

On April 1, 2008, the juvenile court entered a review order finding that the children should be removed from the parents' care and placed in family foster care. The court found:

Despite long-term intensive services to the parents for three years, they have not demonstrated the ability to adequately and safely care for the children. Several child abuse assessments occurred during this time frame The parents are not truthful to [Department] providers about such things as appointments, child illnesses, doctor appointments, and medications. The parents are not working nor have they made any real attempts to find employment and are now using the children's SSI income to meet their entire household expense requirements. Hygiene and cleanliness continue to be problems, and service providers are now going into the home and bathing [S.K.] and [J.K.] two days a week so they will at least be clean for school. It is expected that this service will start for the two younger children later.

Services have been in place to address parenting skills, yet [the mother] is unable to manage the children and [the father] manages them by fear and intimidation. . . .

. . . .
It is fair to say that the parents have cooperated with services; however, their cooperation is best described as allowing service providers to come into their home and provide care and services for the family. The services currently being provided to the family are not teaching services. The parents are no longer watching and learning. Service providers are simply doing it for them.

At this time there are four young, vulnerable special needs children that live in a home where the parents have not demonstrated that they have the ability to meet minimal standards of cleanliness, nurturing and structure, even with the support of the [Department] and the various service providers. The parents verbalize that they have the knowledge necessary to meet the children's needs; however, they are unable to demonstrate this on

a consistent basis. In the opinion of the Department and service providers . . . the children's needs do not appear to be a priority for the parents. It appears that [the father] is not motivated to change despite having the ability to do so. [The mother] is mentally retarded and has limited potential for change and may not be capable of managing the children and the household.

There is no doubt that the [Department] through the service providers along with daycare and the schools have provided reasonable efforts to the family to prevent removal. . . . For some reason, after three years of services, [the parents] are unable to provide for [the children's basic needs].

Services were continued for the parents with the goal of reunification of the children with the parents.

A review hearing was held at the end of October 2008. At that time, the Department recommended that J.K. and S.K. be returned to the parents. The State and guardian ad litem expressed reservations about placing the children back with the parents, but believed it was necessary to preserve the housing then available to the parents. The court found that extended home visits had taken place and the service provider believed the parents were ready for the next step. The court then ordered that J.K. and S.K. be returned to the parents' care.

Concerns immediately arose after J.K. and S.K. were returned to the parents' care. It was reported that J.K., then six, had a knife in his bedroom and had proceeded to cut a teddy bear and his bed. A four-inch blade was found in J.K.'s room by the assessment worker, leading to a confirmed finding of lack of supervision by the parents. Additionally, the parents allowed a family member who was a registered sex offender into their home while having supervised visits with the children. J.K. and S.K.'s academic scores declined after the children were returned to the parents' care. It was questioned whether the parents were helping the children with their schoolwork. It was reported that both children

were eating pencils at school. It was also noted that S.K.'s hygiene began to deteriorate within the first two weeks S.K. was returned home. On January 27, 2009, J.K. and S.K. were again removed from the parents' care and placed in foster care.

In May 2009, the parents' parental rights to the two youngest children were terminated. The parents did not contest the termination, and it was the hopes of the parties that the parents would be able to safely parent the two older children. Services for the parents, including visitation with J.K. and S.K., were continued.

On September 9, 2009, the State filed its petitions to terminate the parents' parental rights. The juvenile court held a contested termination hearing in November 2009. At the hearing, the Department's social worker testified that the Department made every reasonable effort to attempt to return the children to the parents' care, but the services had not alleviated the problems that led to the children's removal and that the children could not be safely returned to the parents' care at the time of the hearing. The worker testified that there was no question that the parents loved the children, but they were not capable of caring appropriately for their children on an ongoing basis. The worker acknowledged that the parents' hygiene had improved and was not an additional concern at the time of the hearing. Additionally, the worker testified that she had seen some improvements in the father's care after the parents' rights to the younger children were terminated. She acknowledged that the father had seen a physician and his health had improved, but she opined it was not enough to return the children to the parents' care. The worker testified that based on the history of the case,

she did not believe the parents could succeed at unsupervised visitation. The worker testified that she believed the parents needed ongoing guidance to maintain a clean home and that safety could not be established without lifetime services. The worker testified that the children were in foster care, but the foster parents had not committed to adopting the children. The worker testified that adoption placement of the children could be difficult, but she believed the children had prospects.

The service provider who worked with the parents also recommended that the parents' parental rights be terminated. She testified that the parents and the children loved each other, and the father had been more involved with the children since their removal from the home. She testified she had concerns about the parents disciplining the children too strictly, and she believed it was unlikely the parents would be able to parent the children without supervision.

The report of the court appointed special advocate (CASA) was admitted as an exhibit at the hearing. The report indicated the CASA had several outstanding concerns in the case, including that the parents were not motivated to make changes in their lives by seeking out employment, job training, education, etc.; not able to know when to discipline the children; and not employed and should have had plenty of time to manage the home and prepare meals, yet they consistently struggled in those areas. The CASA recommended that the parents' parental rights be terminated.

The children's guardian ad litem recommended against termination. He opined that the children were not adoptable and the parents' home and the parents' level of caring for the children was adequate to return the children to the

parents' care. The guardian ad litem conceded that he believed if the children were returned to the parents' care, services would have to continue to be offered for life or until the children turned eighteen. But he opined that services would have to continue for the parents and children regardless, due to the mother and the children's limited mental abilities. Ultimately, the guardian ad litem opined that the children's prospects were worse with termination than without.

In an order filed November 20, 2009, the juvenile court terminated the parents' parental rights to S.K. and J.K. pursuant to Iowa Code section 232.116(1)(g) (2009) (requiring proof of several elements including proof that parent continues to lack ability or willingness to respond to services that would correct situation and an additional period of rehabilitation would not correct the situation). The court concluded:

It is the conclusion of this court that [the parents] continue to lack the ability to respond to services which would correct the situation. They have shown a willingness to respond and have shown a cooperative spirit in dealing with the [Department] and service providers, along with the CASA volunteer and the guardian ad litem. However, it is their ability to respond and specifically whether an additional period of rehabilitation would correct the situation, which is the issue. It is the conclusion of the court that an additional period of rehabilitation would not correct the situation. This conclusion is reached in considering the history of the case. . . .

. . . .

[T]he reasonable efforts of three years, followed by a second chance at rehabilitation of four months has not resulted in a sufficient correction of the conditions that led to the original adjudication. The continuing services since January 30, 2009, through the present have not progressed from supervised visits to unsupervised visits. . . . Neither significant progress nor meaningful momentum forward is noted in these reports. A third chance at rehabilitation is not warranted. Services from February 2005 through November 2009, four years and nine months, have not resulted in resolution of adjudicatory harm.

. . . .

The court places trust in permanency options available to the State. The evidence is not clear and convincing that termination would be detrimental to the children due to the closeness of the parent/child relationship. It is true that there is a closeness in that relationship; however, the argument that it would be detrimental to the children is speculative and without specific proof in the case.

The parents now appeal.

II. Scope and Standards of Review.

We review a decision to terminate parental rights de novo. *In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010). We give weight to the factual determinations of the juvenile court, but we are not bound by them. *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006). Grounds for termination under section 232.116(1) must be proved by clear and convincing evidence. *P.L.*, 778 N.W.2d at 40; *J.E.*, 723 N.W.2d at 798.

III. Discussion.

The parents contend termination of their parental rights is not in the children's best interests. In support of their argument, they assert that the evidence does not support the juvenile court's conclusions that the parents lack the ability to respond to services and that an additional period of rehabilitation would not correct the situation, ultimately challenging the ground for termination, Iowa Code § 232.116(1)(g). Additionally, the parents argue the children's chances of adoption are not good, given their mental and behavioral problems, and consequently permanency for the children would not be achieved in this case by termination of the parents' rights. We disagree.

Our supreme court has recently clarified the analytical framework to determine whether a court should terminate a parent's parental rights under Iowa

Code section 232.116. See *P.L.*, 778 N.W.2d at 35-40. The first step is for the court to determine whether a ground for termination exists under section 232.116(1). *Id.* at 40. “If a ground exists, the court may terminate a parent’s parental rights.” *Id.* at 37 (citing Iowa Code § 232.116(1)). In determining whether to terminate, “the court shall give primary consideration to the child’s safety, to the best placement for furthering the long-term nurturing and growth of the child, and to the physical, mental, and emotional condition and needs of the child.” *Id.* (quoting Iowa Code § 232.116(2)). The judge’s decision should contain any findings in this regard. *Id.* Lastly, “the court must consider if any of the exceptions contained in section 232.116(3) allow the court not to terminate.” *Id.* at 39 (citing Iowa Code § 232.116(3)).

Iowa Code section 232.116 provides the grounds for parental rights termination under chapter 232. Pursuant to the statute, if the court finds that all of the following exist, it may order the termination of parental rights:

(1) The child has been adjudicated a child in need of assistance pursuant to section 232.96.

(2) The court has terminated parental rights pursuant to section 232.117 with respect to another child who is a member of the same family

(3) There is clear and convincing evidence that the parent continues to lack the ability or willingness to respond to services which would correct the situation.

(4) There is clear and convincing evidence that an additional period of rehabilitation would not correct the situation.

Iowa Code § 232.116(1)(g).

After years of services, J.K. and S.K. were returned to the parents’ care in approximately October 2008. There were immediate concerns for the children’s safety and well-being after they were returned to the parents’ care, necessitating

removal once again. Despite the continuation of services, at the time of the termination hearing, the Department's worker, service provider, and CASA all believed that the parents could not safely parent the children without the continued involvement of services. Although the children's guardian ad litem recommended against termination, he conceded that services would have to continue for the parents' to safely parent the children. There was simply no evidence the children could safely be returned to the parents' care at the time of the termination hearing and additional time would not result in the parents being prepared to safely parent the children. Consequently, we conclude the ground for termination under section 232.116(1)(g) was proven.

We next consider the children's safety, the best placement for furthering the long-term nurturing and growth of the children, and the physical, mental, and emotional condition and needs of the children. Iowa Code § 232.116(2). We find the parents' argument that the children's chances of adoption are not good to be without merit. The Department's worked testified that, although adoption may be more difficult, these children still had adoptive prospects. Moreover, in terminating a parent's parental rights, neither the State nor the juvenile court is required

to make a finding that the child[ren are] adoptable in order to terminate parental rights. Our governing consideration is the best interest of the child[ren]. We are not prepared to say that it is within the best interests of the child to refuse to terminate parental rights merely because [the Department] has not made a showing that adoption arrangements have been made. We will not refuse to terminate the rights of parents who would otherwise be terminated because an adoptive home has not been secured.

In re T.C., 522 N.W.2d 106, 109 (Iowa Ct. App. 1994).

Here, the children cannot be returned to their parents' care. Although their foster parents have not expressed an interest in adopting, they are doing better in their foster home and were adjusting to school quite well. Using the framework provided in section 232.116(2), we conclude a termination of the parents' parental rights best provides for the children's safety, long-term growth, and physical, mental, and emotional needs.

Finally, a juvenile court need not terminate if the court finds "termination would be detrimental to the child at the time due to the closeness of the parent-child relationship." Iowa Code § 232.116(3)(c). The factors in section 232.116(3)(c) are permissive. See *P.L.*, 778 N.W.2d at 39. The juvenile court found that the evidence was not clear and convincing that termination would be detrimental to the children due to the closeness of the parent/child relationship. We find no abuse of discretion in the circumstances before us.

IV. Conclusion.

Upon our de novo review, we conclude the ground for termination under section 232.116(1)(g) was proved and termination of the parents' parental rights best provides for the children's safety, long-term growth, and physical, mental, and emotional needs. We find the juvenile court did not err in finding that the evidence was not clear and convincing that termination would be detrimental to the children due to the closeness of the parent/child relationship. Accordingly, we affirm the judgment of the juvenile court terminating the parents' parental rights.

AFFIRMED.

Danilson, J., concurs; Sackett, C.J., dissents.

SACKETT, C.J. (dissenting)

I respectfully dissent. I agree with the guardian ad litem's recommendation that the parents' rights to these children should not be terminated.

The children, now nine and eight years of age, love their parents and are bonded to them. The children have lived with their parents and in several foster homes but there is no adoptive home waiting for them after termination. Prior to the termination hearing the children looked forward to their weekly Saturday visits with their parents.

The guardian ad litem, who recommended against termination, in support of his recommendation commented:

During the visit with the children at the foster home, they were talking about their school. They both agreed that Gym was their favorite class and that they enjoy playing with their new friends. The son's math homework shows that he is doing pretty well and he says he enjoys it, even though it is hard at times. The children said they get to see their real mom and dad on Saturdays. They enjoy the visits and look forward to seeing their parents. Some of the things they do with their parents is play and go out for ice cream. The son said he had a playstation at his parents' house. The children both said that they miss their two young siblings a lot. They also miss the boy who was at their previous foster home. The children appeared to be adequately cared for in foster care and are honestly provided a better environment than their parents are capable of providing. But this is only to the extent of the condition of the home and consistency of the efforts of the foster parents. What the foster home lacks for the children is what they most desperately need, a permanent home.

The parents' residence was acceptable. I did not notice any major health or safety hazards. The parents were appropriate, the father surprisingly well. They addressed and understood what the problems are. The father was very involved in the conversations. Although their home has many draw backs and although the parents have many limitations, it is extremely concerning that there is no adoptive home waiting for these children. The parental rights for their two younger siblings have been terminated for

approximately six months and they still have not been adopted. If these two children cannot be adopted the prospects for the children here would appear much worse. I believe if these children have their parental rights terminated they will be raised by a succession of foster parents and these children will never have permanency. With their parents they will at least be with people who actually want and love them. I believe the parents are able to meet the basic needs of these children. Given that I think it would be inappropriate to relegate these children to a succession of foster parents.

It is clear the parents love their children. There were serious limitations on whether the parents could raise the two younger children. The children here are at the age to where they do not need constant supervision. Currently there is no permanent placement for their younger siblings and they are more adoptable than the children here. I think terminating the parent's parental rights without an adoptive home set and ready is not in the best interest of the children. I think the children need permanency at this point, and not being moved from foster home to foster home. Therefore, my recommendation is that the parental right of the parents here not be terminated.

I am unable to find, as did the majority, that termination of the parents' rights best provides for the children's mental and emotional needs. See Iowa Code § 232.116(2) (2009). I recognize, as the majority states, that in terminating a parent's parental rights we are not required to find the children adoptable in order to terminate their parental rights. However, in assessing a child's interests I believe it is imperative that we not necessarily assume the children will be better off in the State's care without evidence that will be the case. See *In re N.M.*, 528 N.W.2d 94, 96 (Iowa 1995) (recognizing "a rebuttable presumption that the best interest of a child is served when custody is with the natural parents"); Iowa Code § 232.1 (giving preference to a child's own home).

Nor can we give too little weight to a parent's love for a child and a child's desire that the biological family remains intact. I believe these children have a sense of family and bonding and it is interesting to me that the guardian ad litem

reported the children expressed to him their “missing a lot” their younger siblings after the parents’ rights were terminated to them in May of 2009. Their losing these siblings has caused them emotional harm.

I also am not sure the services offered were tailored to the parents’ abilities. See *id.* § 232.102(10) (“Family-centered services are adapted to the individual needs of a family in regard to the specific services and other support provided to the child’s family and the intensity and duration of service delivery.”). The juvenile court found that “the parents have not demonstrated the ability to meet minimal standards of cleanliness, nurturing, and structure.” This finding tells me that attempts to teach the parents met limited success. They may need assistance with parenting. I would reverse the termination and remand to order that efforts be made to give them the assistance they need.