IN THE COURT OF APPEALS OF IOWA

No. 0-653 / 10-1230
Filed October 6, 2010

IN THE INTEREST OF D.W.,
Minor Child,

A.M.W., Mother,
Appellant.

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

A mother appeals the termination of her parental rights to her child. **REVERSED.**

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

Thomas J. Miller, Attorney General, Janet L. Hoffman, Assistant Attorney General, Michael Walton, County Attorney, and Julie Walton, Assistant County Attorney, for appellee.

Jean Capdevila, Davenport, attorney and guardian ad litem for minor child.

Considered by Sackett, C.J., and Potterfield and Tabor, JJ.

POTTERFIELD, J.

I. Background Facts and Proceedings

A.W., a twenty-two-year-old mother, challenges the termination of her parental rights to her one-year-old son, D.W. D.W. was born in June 2009. D.W. is A.W.'s third child. The juvenile court terminated A.W.'s parental rights to a daughter in 2007 and another son in 2008. The Iowa Department of Human Services (DHS) removed D.W. from his mother's care on August 25, 2009, after she left the infant with his putative father, D.T., who was very intoxicated at the time. DHS also believed D.T. was an inappropriate caregiver because he had a history of domestic violence. He and A.W. fought that day and the violence in their relationship was part of the calculus in terminating their parental rights to an older son they had in common. After their confrontation on August 25, 2009, A.W. obtained a protective order against D.T. She did not have contact with D.T. during the pendency of the case.

The court adjudicated D.W. to be a child in need of assistance (CINA) on September 23, 2009. DHS placed D.W. in foster care with two siblings who had been adopted by the foster family. A.W. had supervised visits with D.W. three times a week at the apartment she shared with her mother and her mother's boyfriend. A.W. was no longer using controlled substances.

On April 21, 2010, the State petitioned for termination of A.W.'s parental rights. On July 13, 2010, the juvenile court issued its order terminating A.W.'s

parental rights to D.W. based on Iowa Code sections 232.116(1)(d), (e), (g), (h), (i) and (*l*) (2009) and 232.117.[1] A.W. appeals.

II. Scope and Standard of Review.

We review de novo the juvenile court's decision to terminate parental rights. *In re Z.H.,* 740 N.W.2d 648, 650 (Iowa Ct. App. 2007). The parent-child relationship is constitutionally protected. *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 554, 54 L. Ed. 2d 511, 519 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 233, 92 S. Ct. 1526, 1542, 32 L. Ed. 2d 15, 35 (1972). The State must prove grounds for termination by clear and convincing evidence. *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006). Evidence is clear and convincing when it leaves no serious or substantial doubt about the correctness of the conclusion drawn from it. *In re D.D*., 653 N.W.2d 359, 361 (Iowa 2002). Our primary concern is the best interests of the children. *Id*.

III. Mental Disability

A.W. argues on appeal that her parental rights were terminated solely because of her mental disability. A mental disability alone is not a sufficient reason for the termination of the parent-child relationship, but may be "a contributing factor to the inability to perform the duties of a parent." *In re O'Neal*, 303 N.W.2d 414, 422 (Iowa 1981). Thus, mental disability is a proper factor to consider in determining whether the child's interests and welfare require a

[1] Iowa Code sections 232.116(1)(e) (parent fails to maintain significant and meaningful contact with the child) and (*l*) (parent has a severe, chronic substance abuse problem and presents a danger to self or others) clearly did not apply to the facts of this case at the time of termination. The State does not assert on appeal that grounds exist for termination under these code sections.

termination of the parent-child relationship. *Id*. However, this standard is only meaningful if there is an "inability to parent." *See In re K.F.*, 437 N.W.2d 559, 560 (Iowa 1989). On our de novo review of the record, we cannot find that such an inability to parent exists in this case.

A.W. has low intellectual functioning, a fundamentally limited ability to process information. However, the record shows that A.W. has accomplished much despite her mental challenges. Care providers testified that A.W. responded to services. Indeed, a review of the record reveals that A.W. made steady progress and benefitted from DHS services. The DHS case manager assigned to this case testified that A.W. attends to D.W.'s needs in general: she prepares meals for her son, changes his diapers, gets him out of his car seat when he arrives for visits, plays with him, takes him to the park, and takes him to the store to buy gifts and have his picture taken. She is affectionate with the child and has demonstrated the ability to nurture him; he has a bond with her. Further, she had maintained her sobriety from illegal drugs for two and one-half years at the time of trial. She obtained a protective order to prevent contact from her abusive boyfriend and the father of two of her children and has not had contact with him. She has maintained stable housing with her mother and her mother's boyfriend, who provide some support to her. Based on this information, we cannot agree with the juvenile court's conclusion that in the past four years A.W.'s "capacities have not changed as to her life choices and her parenting."

Although the record also shows that providers have had to repeat instructions for A.W., that she answered some questions wrong on a parenting

assessment, and that she may have difficulty planning activities for D.W as he grows and develops, no one testified she was unable to learn basic skills or was unwilling to accept help.[2] Though a care provider noted that A.W. did not "step in" to help the visit's supervisor hold the child as they sat outside on the stairs, the same provider described the mother as doing a "good job ensuring that [D.W.] did not fall down the steps" a week later. We believe A.W. has shown "real and steady progress" in improving her parenting skills. *See In re T.O.*, 470 N.W.2d 8, 12 (Iowa 1991).

The juvenile court found D.W. could not be returned to his mother's care without "high risk of adjudicatory harm in the nature of physical abuse, neglect, failure of supervision and failure of the parents to provide necessities, appropriate shelter or safety." The record does not support a finding that any of these issues were present in this case at a level that would constitute an "inability to parent." The DHS case manager's conclusion that A.W.'s parental rights should be terminated appears to have been primarily based not on safety concerns, but rather on A.W.'s previous unhealthy relationships and involvement in domestic violence, issues that were present in the previous terminations of A.W.'s two children but were no longer an issue in this case. The minor and intermittent safety issues involved in this case do not constitute an inability to parent and do not meet any of the six statutory requirements for termination used

[2] In other areas of daily living, our law requires accommodation for individuals with disabilities. *See, e.g.*, 42 U.S.C.A. § 12101 et seq. (1990) (the Americans with Disabilities Act).

by the juvenile court to terminate A.W.'s parental rights. We therefore reverse the termination of A.W.'s parental rights to D.W.

REVERSED.

Sackett, C.J., specially concurs; Tabor, J., dissents.

SACKETT, C.J. (concurs specially)

I concur with the majority in all respects. I realize that the mother, because of her disability, is always going to need some assistance with parenting, but that does not mean that with assistance she cannot care for her child. Consequently, I fail to find clear and convincing evidence to support termination of her parental rights. The question of whether the foster parents are better parents is not really the issue. *See In re Burney*, 259 N.W.2d 322, 324 (Iowa 1977) ("Courts are not free to take children from parents simply by deciding another home offers more advantages."). As one commentator once noted, if we look to the best interest of the child then only the most worthy should be allowed to parent and there is insufficient evidence here that the foster parents are the most worthy.

TABOR, J. (dissenting)

I respectfully dissent. I share the juvenile court's view that D.W. cannot be safely returned to his mother's care at this time, and the best placement for furthering the child's long-term nurturing and growth is with his foster family.

The State presented clear and convincing evidence that termination is proper under Iowa Code section 232.116(1)(h) (2009). *See In re S.R.*, 600 N.W.2d 63, 64 (Iowa Ct. App. 1999) (holding where juvenile court terminates on more than one ground, the appellate court need only find sufficient grounds under one of the statutory sections cited in the termination ruling). The first three elements of subsection "h" are uncontested: D.W. is younger than three years, was adjudicated a child in need of assistance, and has been removed from the mother's custody for more than six consecutive months. Iowa Code § 232.116(1)(h). I also believe the fourth element is satisfied; there is clear and convincing evidence in the record that D.W. cannot be returned to his mother's custody at the present time. *See id*. Even the child's guardian ad litem, who did not recommend termination, told the juvenile court: "I can't recommend that he go home today, and I don't think she has any more time under the guidelines."

D.W. was only two months old when the DHS removed him from his mother's care. During the ten months leading up to the termination hearing, A.W. has had only fully supervised visits with her son. A.W. has been receiving services from the DHS for nearly four years (including the unsuccessful efforts to reunify her with her two older children), but her parenting skills have not risen to the level where the DHS case manager felt comfortable recommending semi-

supervised visits, much less placing full responsibility for the child with A.W.

While the majority is correct that a mental disability standing alone is not a sufficient reason to terminate a person's parental rights, *see In re K.F.*, 437 N.W.2d 559, 560 (Iowa 1989), it may be considered as a contributing factor to the inability to perform the duties of a parent. *State ex rel. Leas*, 303 N.W.2d 414, 422 (Iowa 1981).

The DHS case manager and the family consultant both testified that A.W.'s low intellectual functioning stands in the way of her recalling and using everyday safety measures with her son. For example, she did not remember their instructions on how to help the emerging toddler safely negotiate stairs and she struggled with the proper operation of his car seat. During the supervised visits, the workers have on more than one occasion caught D.W. from falling off a couch or downstairs when A.W. was not aware of the danger. In the opinion of the DHS case manager, A.W. did not have the ability to supervise and plan activities appropriate for D.W. as he reached a more active developmental stage. As the juvenile court observed: "[A]s the child grows older and becomes more mobile and seeks to grow and learn and explore his world, the mother continues to parent as if he was much younger."

A.W. also has had difficulty comprehending how to meet her son's nutritional needs, despite repeated efforts by the DHS workers to counsel her on providing healthy foods. In her testimony at the termination hearing, A.W. admitted her limited ability to understand information presented to her.

I disagree with the majority's characterization of these deficiencies as "minor and intermittent safety issues." A.W.'s inability to recognize that a fall down a flight of stairs could pose great harm to a toddler is a serious and constant concern. The ability to provide a safe and healthy environment for a child and to understand his changing needs as he grows is fundamental to the task of parenting.

The majority notes that A.W. answered some questions wrong on a parenting assessment. A.W.'s actual answers provide important insight into her inability to set age-appropriate expectations for her son. For instance, A.W. expressed her belief that it was "the child's job to recognize the mother is having a bad day and to meet the mother's needs." She also agreed with an assessment question that "babies need to learn how to be considerate of the needs of the mother," and that one-year-olds "should be able to stay away from things that could harm them." A.W.'s responses concerned the DHS worker.

The majority also states that A.W. has maintained stable housing with her mother and her mother's boyfriend. But at the time of the disposition hearing, A.W. had moved out of her mother's home due to a conflict with her mother and was staying with friends. The DHS reported that A.W. moved back in after the hearing. A.W.'s sporadic moves do not support the stability suggested by the majority opinion.

This is not an easy case. A.W. has worked to overcome substance abuse problems and has taken steps toward protecting herself from unhealthy relationships. She loves her son and wants to be a good parent. But the factors

in section 232.116(2) weigh in favor of termination. *See In re P.L.*, 778 N.W.2d 33, 37 (Iowa 2010) (requiring court to apply best-interest framework in section 232.116(2) after finding ground for termination in section 232.116(1)). A.W.'s ability to provide for her son's basic needs is hampered by her limited mental capacity. Iowa Code § 232.116(2)(a). On the other side of the balance, D.W. has become integrated into his foster family; he is happy with his foster parents and they are anxious to adopt him. That placement offers the better prospect for furthering his long-term nurturing and growth, and meeting his physical, mental and emotional needs. *See id.* § 232.116(2)(b); *see also In re J.E.*, 723 N.W.2d 793, 802 (Iowa 2006) (Cady, J., concurring specially) (highlighting a child's safety and the need for a permanent home as the defining elements of a child's best interests).

I agree with the juvenile court's conclusion that termination of A.W.'s parental rights is in the best interest of D.W.