

IN THE COURT OF APPEALS OF IOWA

No. 0-762 / 10-1415
Filed February 9, 2011

**IN THE INTEREST OF K.K.,
Minor Child,**

**P.J.K., Mother,
Appellant,**

**T.D.K., Father,
Appellant.**

Appeal from the Iowa District Court for Franklin County, Peter B. Newell,
District Associate Judge.

A mother and father appeal separately from the order terminating their
parental rights. **REVERSED AND REMANDED ON BOTH APPEALS.**

Patrick McMullen of Kaplan, Frese & Nine, L.L.P., Marshalltown, for
appellant mother.

Michael Cross, Hampton, for appellant father.

Thomas J. Miller, Attorney General, Bruce Kempkes and Janet Hoffman,
Assistant Attorney Generals, Dan Wiechmann, County Attorney, and Brent
Symens, Assistant County Attorney, for appellee State.

Larry Johnson of Walters & Johnson, Iowa Falls, for minor child.

Heard by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ.

DANILSON, J.

A mother and father appeal from the termination of their parental rights to their youngest child, K.K., born in August 1999.¹ The parents contend their due process rights were violated when the court allowed the State to amend the petition after trial began to add two additional grounds for termination. Upon our de novo review, we find the parents did not receive adequate notice, and we reverse the order terminating parental rights premised upon the two grounds added via the amendment. We also conclude the evidence does not support termination of the mother's parental rights on the remaining ground alleged in the original petition. We remand the case to the juvenile court for hearing on whether the amended grounds exist for termination after proper notice has been given to the parents.

I. Amended Petition.

The State's petition filed in May 2010 sought to terminate the parental rights of both parents pursuant to Iowa Code sections 232.116(1)(d), (e), (i), and (k) (2009). The child had not been in the parents' custody since October 2005, except for a brief placement with the father in the summer of 2009. During the first day of trial, July 14, 2010, the State moved to amend the petition to include sections 232.116(1)(f) and (l) stating:

After reviewing the Code section 232.116, [we] still think probably the (d), (e), (i) and (k) listed in the Petition would be sufficient, but we would move to amend now to also include the allegations in 232.116(1)(f) and 232.116(1)(l). I think those are

¹ The parents have two older children, born in 1995 and 1990, who are not subjects of this proceeding. The older child is no longer a juvenile, and the middle child was placed in a shelter.

appropriate in addition to the ones which have been listed previously.

.....
The (f) and (l) have all been dealt with all along and are pretty closely matched to some of the other—(d) and (e) and (i) and (k)—previously been alleged. There [are] small differences, but I think they would all be appropriate.

We've dealt with that in the previous testimony, and therefore, I don't think there is any surprise at this time.

Over due process objections by the attorneys for the mother and father, the juvenile court allowed the amendment. The court further stated it would listen to further argument if the parties felt they needed "additional time to respond to the amendment." The State presented the bulk of its case on the first day of trial, when the majority of the witnesses testified. The second day of trial was scheduled nearly two weeks later, on July 27, 2010, at which time the court heard testimony from the mother and father.

The court ultimately found the evidence presented established by clear and convincing evidence the grounds for termination of the father's and mother's parental rights pursuant to the amended sections 232.116(1)(f) and (l). The court further determined the State did not prove the elements necessary to terminate the father's parental rights under any sections originally pled.²

The parents argue that the juvenile court erred in allowing the State to amend its petition without sufficient notice and in violation of their due process rights.³ Both the Federal and State Constitutions provide that no person shall be

² The court found clear and convincing evidence to terminate the mother's parental rights under section 232.116(1)(k) as alleged in the original petition.

³ The mother did not raise this issue in her petition on appeal, but did raise it after full briefing was ordered. The father raises several additional arguments on appeal; however, because we conclude the father's due process rights were violated and remand on that issue, we need not address his remaining arguments.

deprived of life, liberty, or property, without due process of law. U.S. Const. amends. V, XIV; Iowa Const. art. I, § 9. “[F]reedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.” *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 1394, 71 L. Ed. 2d 599, 606 (1982). A natural parent has due process rights at parental termination proceedings. *In re A.M.H.*, 516 N.W.2d 867, 870 (Iowa 1994).

Clearly, we have a duty to enforce the procedural safeguards contained in Iowa Code chapter 232. “We recognize that the nature of the process due in parental rights termination proceedings turns on a balancing of three factors: ‘[T]he private interests at stake, the government’s interest, and the risk that the procedures used will lead to erroneous decisions.’” *Id.* at 870 (quoting *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27, 101 S. Ct. 2153, 2159, 68 L. Ed. 2d 640, 649 (1981)). DHS and the juvenile court both have the important function of protecting children who are in need of assistance. However, taking a child away from the care and custody of a parent is of serious consequence.⁴ We therefore must carefully observe statutory procedural safeguards. *Id.* at 871.

Due process requires sufficient notice of the complaint against the parent and of the time of the hearing. *In re D.E.D.*, 476 N.W.2d 737, 739 (Iowa Ct. App. 1991), *overruled on other grounds by P.L.*, 778 N.W.2d at 38-39; *see also A.M.H.*, 516 N.W.2d at 870-71. Our court determined a father’s due process

⁴ The right of a parent to companionship, care, custody, and management of his or her children has been recognized as “far more precious . . . than property rights,” *May v. Anderson*, 345 U.S. 528, 533, 73 S. Ct. 840, 843, 97 L. Ed. 1221, 1226 (1953), and more significant and priceless than “liberties which derive merely from shifting economic arrangements.” *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212, 31 L. Ed. 2d 551, 558 (1972); *see also A.M.H.*, 516 N.W.2d at 870.

rights were violated where the State was allowed to amend a termination petition during trial to allege a new ground for termination because he had no notice prior to the hearing of the ground under which termination was decreed. *D.E.D.*, 476 N.W.2d at 739-40. Similarly, in this case, the juvenile court allowed the State to amend the petition during trial to include the grounds under which the court ultimately found to support termination.

The State argues on appeal that the parents' due process rights were not violated because the court stated it would allow additional time to respond to the amendment, but neither parent requested additional time. The State further contends "the grounds added at the time of the termination hearing included issues that were apparent from the beginning of this case, nearly five years prior to the termination hearing."

We agree the amended grounds include issues that have been relevant since these proceedings were initiated in 2005. Additionally, the evidence used to prove the grounds for termination under one section may be the same or similar to the evidence used to prove the grounds for termination under a different section. See, e.g., *In re S.R.*, 600 N.W.2d 63, 64 (Iowa App. 1999). However, further preparation may be necessary, and the witnesses and evidence the parents use to defend the allegations may not be the same.

Here, the grounds originally pled and the amended grounds are distinct. The new grounds under section 232.116(1)(f) and (l) focus on different issues, such as whether the child can be returned to the parent at the present time and the parent's severe, chronic substance abuse. Fairness requires notice of these allegations in advance of trial. The parents should have the opportunity to

introduce evidence specifically targeted at disproving each element if such evidence is available. *Id.* at 740.

The court's statement that it would listen to further argument if the parents felt they needed additional time to respond to the amendment is not adequate to meet due process requirements because the court was sufficiently alerted to the constitutional infirmities of the notice. While we recognize juvenile court proceedings are informal and designed to protect children, *In re Henderson*, 199 N.W.2d 111, 120 (Iowa 1972), this goal may still be met without sacrificing the rights of the parents. Because the parents did not receive adequate notice and, as a result, were given insufficient time to prepare their defense to the grounds alleged in the amended petition, we reverse the order terminating parental rights pursuant to sections 232.116(f) and (j).

II. Additional Ground to Terminate the Mother's Parental Rights.

In addition to the amended grounds, the juvenile court also found clear and convincing evidence to terminate the mother's parental rights pursuant to Iowa Code section 232.116(1)(k). On appeal, we may affirm the juvenile court's termination order on any ground relied upon by the district court that we find supported by clear and convincing evidence. *In re D.W.*, ___ N.W.2d ___, ___ (Iowa 2010). After our de novo review of the record, *P.L.*, 778 N.W.2d at 40, we conclude the ground for termination does not exist under section 232.116(1)(k).

The mother claims she has shown "marked improvement" in the recent months and was improving enough for the child to return home in the "reasonably

near” future. We interpret the mother’s argument as her contention that the statutory ground for termination has not been met.⁵

We begin by acknowledging the mother’s lengthy history of chronic mental health problems. The child was removed in October 2005, following the mother’s suicide attempt and subsequent hospitalization on a mental health committal.⁶ The mother reported that she was depressed and had an addictive personality, and began taking medication for her depression. A family-centered psychological evaluation completed in April 2006 revealed the mother had “significant personality deficits which suggested a very poor prognosis” as to her ability to successfully parent in the future. Over the next several years of services, the mother ceased contact with DHS and went off the radar for months at a time. The mother failed to receive any significant or continuous treatment for her mental health issues, despite continued recommendations by the court and service providers to seek such treatment. A second family centered psychological evaluation with the same doctors completed in January 2010 revealed that the mother “had made little or no progress in her psychological development since she was last evaluated.”

However, the mother has made some recent improvements. She claims she “came to the realization that she had an alcohol addiction” in January 2010. Apparently, this realization is somewhat connected to her mental health

⁵ The mother raises several additional arguments on appeal; however, because we do not find clear and convincing evidence to terminate the mother’s parental rights under the only section upon which proper notice was provided, we need not address her remaining arguments.

⁶ The mother took a large amount of pills and called Poison Control. She was placed in a psychiatric facility for five days.

concerns, as the mother claims to have exhibited a “noticeable difference” in her attitude toward DHS and her dedication to improving her parenting skills and mental health since January 2010. The record indicates that in the six months prior to the termination hearing, the mother regularly attended parenting classes and participated in psychiatric evaluations and medication management. We further note that the mother is employed and lives in a three-bedroom apartment that “would be appropriate for [the child].”

Termination is appropriate under section 232.116(1)(k) where the court finds all of the following have occurred:

(1) The child has been adjudicated a child in need of assistance and custody has been transferred from the child’s parents for placement.

(2) The parent has a chronic mental illness and has been repeatedly institutionalized for mental illness, and presents a danger to self or others as evidenced by prior acts.

(3) There is clear and convincing evidence that the parent’s prognosis indicates that the child will not be able to be returned to the custody of the parent within a reasonable period of time considering the child’s age and need for a permanent home.

There is no dispute that the child has been adjudicated CINA and custody has been transferred. Section 232.116(1)(k) next requires us to look at the mother’s prior acts to determine if there is a chronic mental illness for which the mother has been repeatedly institutionalized, and whether the mother presents a danger to herself or others. The mother’s mental illness has obviously been a long-standing problem; however, the record does not support the conclusion she has been *repeatedly* institutionalized for mental illness. The record reflects the mother’s only institutionalization for mental illness occurred in October 2005.⁷

⁷ The mother’s other hospitalizations were for substance abuse issues.

Because the State has not presented clear and convincing evidence that the ground for termination under section 232.116(1)(k) exists, we are compelled to reverse the order terminating the mother's parental rights.

III. Conclusion.

We find the parents did not receive adequate notice in regard to the grounds alleged in the amended petition. We therefore reverse the order terminating parental rights pursuant to Iowa Code sections 232.116(f) and (l). We further find there is not clear and convincing evidence to support termination of the mother's parental rights under section 232.116(1)(k) as alleged in the original petition. We remand the case to the juvenile court for hearing on whether the amended grounds exist for termination, after proper notice has been given to the parents.

REVERSED AND REMANDED ON BOTH APPEALS.