

IN THE COURT OF APPEALS OF IOWA

No. 0-772 / 10-1389
Filed December 8, 2010

**IN THE INTEREST OF K.F., R.B., and R.B.,
Minor Children,**

C.E.F., Father,
Appellant,

R.F., Mother,
Appellant.

Appeal from the Iowa District Court for Black Hawk County, Kellyann M. Lekar, Judge.

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

Tammy L. Banning of Tammy L. Banning, P.L.C., Waterloo, for appellant-father.

Kelly J. Smith of Kelly J. Smith, P.C., Waterloo, for appellant-mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Steven J. Halbach, Assistant County Attorney, for appellee.

Linnea Nicol, Assistant Juvenile Public Defender, Waterloo, attorney and guardian ad litem for minor children.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

SACKETT, C.J.

A mother and father each appeal from the order terminating their parental rights. The mother contends the court erred in ordering termination instead of establishing permanency through a guardianship. The father contends the court erred in ordering termination when “evidence supported deferring permanency” and when establishing a guardianship with a relative was a permanency option. We affirm on both appeals.

BACKGROUND. R.F. is the mother of five children but only the youngest three, K.F., born in 1999, Ric.B., born in 2002, and Rik.B., born in 2004, are involved in these proceedings.¹ C.F. is the father of K.F.² In February of 2009 the mother left K.F. and T.B. with a maternal aunt and Ric.B. and Rik.B. with the maternal grandparents with no provision for the relative caretakers to be able to obtain medical care for the children, no support for the children, and no indication when the children would be picked up by the mother. After an unsuccessful attempt to meet with the parents, the Iowa Department of Human Services obtained a court order for temporary removal of the children in mid-February. Despite being notified, neither R.F. nor C.F. appeared at the hearing where the removal was confirmed. A child protective assessment completed in March was founded for physical abuse and denial of critical care. Neither parent participated

¹ The oldest child, T.B., born in 1996, is in the guardianship of the maternal aunt. Before the termination proceeding, the aunt moved to Texas with T.B. The next-oldest child, L.B., was twelve years old at the time of the termination hearing. The child has been in the care of a family friend and childcare provider for virtually all of her life under an informal arrangement.

² The parental rights of the father of Ric.B. and Rik.B. also were terminated, but he is not involved in this appeal.

in a family team meeting in late March. K.F. reported her dad hit her with a belt on the eye, which was swollen and bruised. The children witnessed the mother attempting to stab the father with a knife, cutting his arm. There was little food in the house. Meals mostly were Ramen noodles and snacks. The children reported the parents were using drugs and have witnessed drug dealers in the house.

The State petitioned to have the children found to be in need of assistance, alleging a history of domestic violence, substance abuse, mental health concerns, failure to provide critical care, and physical abuse. Following a hearing in early April, at which the parents appeared and stipulated to the finding, the court found the children in need of assistance under Iowa Code sections 232.2.(6)(b), (c)(2), (g), (j), and (n) (2009). The court ordered the parents to participate in family safety, risk, and permanency services, couples' or domestic violence counseling, substance abuse evaluations, and random drug screens. It also ordered remedial services for the children and supervised visitation at the discretion of the department.

Following a hearing in late May, at which neither parent appeared, the court issued a dispositional order. It found the parents were "totally uninvolved" and returning the children "to the custody of these uninvolved and uncaring parents" was contrary to the children's welfare. It ordered the parents to complete substance abuse and mental health evaluations and follow all recommendations. It further ordered them to participate in couples' counseling and related domestic violence prevention services. The court continued the

children in the custody of the department for continuing physical placement with relatives. The T.B. and K.F. remained with the maternal aunt; Ric.B. and Rik.B. remained with the maternal grandmother. Both relatives requested that the children be removed from their care at the end of the school year, but later withdrew the requests. Both the department and the children's guardian ad litem were concerned that the parents were being allowed unsupervised contact with the children by the relatives with whom they were placed. The aunt also expressed concern that the parents lacked any incentive to work toward reunification as long as the children were placed with relatives.

A review hearing took place November. By this time C.F. was in jail. Neither parent attended the hearing. The parents had not complied with or participated in any of the court-ordered services. They had not participated in supervised visitation with the children nor in a family team meeting. The court noted the parents "have totally failed to seek to resume custody of the children" and "are not willing to provide them care or be involved in their lives." The court continued the children in relative placement, in part based on the relatives' expressed desire to be considered as long-term and concurrent placements for the children. The court reiterated the orders for the parents to participate in various services.

After a modification of disposition and permanency hearing on February 17, 2010, the court placed T.B. in the guardianship of the maternal aunt, who was moving to Texas. The court also moved K.F. from the aunt's care to the care of the maternal grandmother, who then had all three children who are the

subject of this appeal. The court noted that the grandmother had indicated she was not a permanent placement option, but “in light of new information concerning a potential relative placement, the grandmother has agreed to maintain the children in her home until that possibility can be more fully considered.” The court continued the hearing on modification of disposition and permanency as to the three children until April.

On February 19 the State filed applications for a temporary removal order and hearing after K.F. reported the mother was continuing to have frequent contact with the children without permission of the department, the mother and grandmother wanted all three children to move to another relative placement where the mother would be with the children after school and in the evening, and the mother stated she would take all the kids and move to Detroit, Michigan, if the State tried to take away her parental rights. The children were removed from the grandmother’s care and placed in family foster care.

Following an April 6 hearing on the temporary removal, modification of disposition, and permanency, the court found it in the children’s best interest to continue in family foster care and placed the children in the custody of the department for placement in family foster care. It ordered mental health counseling, substance abuse and drug testing, family safety, risk, and permanency services, and visitation at the discretion of the department for the mother. The court prohibited telephone contact between the mother and the children because of its negative effect on the children’s stability. The GAL recommended caution concerning contact with the mother because of extreme

reactions of the children, especially Ric.B., after visitation such as enuresis and soiling himself, and the mother's inappropriate coaching of the kids. The GAL also expressed concern about Ric.B.'s mental health and his need for a psychiatric evaluation and possible treatment because of his hallucinations. Ric.B. also reported his mother took a knife to cut herself when she was mad and he was going to cut himself when he was mad. Ric.B. becomes aggressive, biting, kicking, screaming. The father of K.F. was still incarcerated.

After a combined pretrial hearing on permanency and termination in mid-May, the court expanded the orders concerning Ric.B. to allow for his placement in a mental health facility for a thirty-day psychiatric evaluation. It also ordered "any and all home studies" be expedited in anticipation of the hearing on permanency and termination in July.

The mother appeared at the July 9 hearing, but presented no evidence. The father appeared by telephone, testified, and presented evidence. As the court recounted the various proceedings in its findings of fact, it repeatedly noted the mother's refusal to participate in services, refusal to submit drug screens, and admissions she was using marijuana daily and drinking several times a week. In February of 2010 she was hospitalized for mental health issues including visual and auditory hallucinations and suicidal and assaultive thoughts. The court noted the mother's inconsistent visitation with the children at times was positive and at other times was negative. The court further found the mother "has failed to participate or to participate with any meaning in most of the services offered by the department and has never invested in the reunification services to regain

custody of her children.” It found the mother and some relative caretakers “have engaged in deceitful behavior in violating court orders regarding contact between the mother and the children.”

Concerning the father of K.F., the court found he had not appeared at the majority of the case proceedings and “never participated in services or had meaningful contact with his daughter during any relevant period.” In considering the father’s request for a six-month deferral of permanency, the court found:

[K.F.’s father] has a lengthy criminal history. He has been incarcerated five times. At the time of trial he was incarcerated. He had a parole review date in late July 2010, with an anticipated recommendation for release to a residential facility. If released on parole, it would likely be two to three months before he was able to be assigned to the residential facility and his placement there could last up to one year. Upon release to the residential facility, he will need to find employment and comply with the terms of the facility.

The court terminated the mother’s parental rights under Iowa Code sections 232.116(1)(d), (f), (i), (k), and (l). It terminated K.F.’s father’s parental rights to her under sections 232.116(1)(d), (f), and (i). It terminated the parental rights of the father of Ric.B. and Rik.B. under sections 232.116(1)(b), (d), (e), (f), and (i). The mother and the father of K.F. appeal.

SCOPE OF REVIEW. Our review of juvenile court orders in child-in-need-of-assistance and termination-of-parental-rights proceedings is de novo. Iowa R. App. P. 6.907 (2009). 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 the statutory grounds for

termination by clear and convincing evidence. See Iowa Code § 232.117(3) (2009).

DEFERRING PERMANENCY. The father contends the juvenile court erred in concluding sufficient grounds exist to terminate his parental rights, when evidence supported deferring permanency instead. He argues he has a plan to resume custody of K.F. following his anticipated parole from prison. He intends to resume his previous employment, save money for housing, and attend AA/NA meetings. He asserts he “would achieve all goals in the case plan if given an additional six months.” He testified he is willing to take custody of K.F.’s half-siblings.

In order for the court to continue a child’s placement for an additional six months, the court must

enumerate [in the order] the specific factors, conditions, or expected behavioral changes [that] comprise the basis for the determination that the need for removal of the child from the child’s home will no longer exist at the end of the additional six-month period.

Iowa Code § 232.104(2)(b) (2009). The juvenile court carefully considered the father’s request for additional time and noted that half the requested additional time would be gone before the father even was released to the residential facility, where he would be for up to a year. The court also noted the father would have to obtain employment after his release. Given the father’s history, physically abusing his daughter and being incarcerated five times, the juvenile court did not find it appropriate to defer permanency. We, like the juvenile court, are not able to see any basis to determine “the need for removal of the child from the child’s

home will no longer exist at the end of the additional six-month period.” See *id.* Deferring permanency is not a viable option in this case. We affirm on this issue.

GUARDIANSHIP. The mother and father both contend the juvenile court erred in determining sufficient grounds existed to terminate rather than establish permanency through a guardianship in a relative or suitable other. They do not challenge the statutory grounds for termination. They argue there was evidence that C.F.’s mother and sister in Michigan are appropriate placements as is the home of Bishop and Gloria Hence. Gloria is K.F.’s godmother. They point to an approved home study of the Hence home and that the Hence family lives in the same community as the children’s family, so the children could maintain a relationship with extended family. L.B., an older sibling is in the Hence home and has been in their care almost all her life. The Hences also had cared for Rik.B., the youngest girl, for about three years. The mother asserts there “was no evidence presented that the Hence home would not be a stable, loving home for these three children, and the court erred in failing to consider the Hence family under a permanency order, specifically a guardianship.” The father asserts a guardianship should have been considered because

termination of parental rights was not appropriate considering the age of [K.F.], guardianship was already chosen regarding a half sibling, . . . another half sibling resided with the Hences, . . . three separate relative placements had come forward to be considered, and that preference must be given to relatives over foster care.

When Gloria Hence contacted the department in April of 2010, she initially expressed an interest only in the youngest girl, Rik.B. When told the recommendation was for all three children to be placed together, Gloria said they would not have room for all three, but loved Rik.B. dearly. The home study of the

Hence home noted that if the three children were placed there, one girl would share a bedroom with the older child, the boy would have a bedroom, and the other girl would have to sleep on a mattress in the master bedroom. The home study and the department expressed some concern whether the Hences would be able to maintain boundaries with the parents if they wanted to be involved with the children.

The paternal grandmother of K.F., who lives alone in Michigan, contacted the department in early May concerning being a placement for K.F. The mother had contacted her about K.F., but the grandmother did not know the children had been removed. She last saw K.F. "a long time ago" and did not know if K.F. would know her. She was informed of the recommendation that all three children remain together, but still wanted to be considered. She called a couple of days later and said she had a daughter who would be willing to take all three children. After further discussion, the grandmother said she would continue with the interstate compact process on her own, without her daughter, and have the daughter contact the department if she wanted to pursue being considered as a possible placement for the children.

In its June 29 report to the court before the July 9 termination hearing, the department attached the completed relative home study of the Hence home, which was approved. The report noted the Hences would need to complete classes and pass an adoptive home study before the department would consider moving the children. The report also noted the department had requested a home study of C.F.'s mother (K.F.'s paternal grandmother) and sister through the

interstate compact process. The studies were scheduled for July 19 and August 6 respectively.

The foster family has welcomed all three children. The foster mother is a special education teacher. All three children have struggles, but have been progressing while with the foster family. K.F. has moved from being a caregiver to Ric.B. and Rik.B. to enjoying life as a child. She has progressed in school and made friends. Ric.B. has severe mental health issues such as auditory and visual hallucinations, but is improving with medication management. The foster parents work with him at home and make certain he receives much-needed psychiatric care. He made great improvement in a school program for significantly delayed readers. The foster mother reports that he continues to have struggles, but they are manageable. Rik.B. struggles with aggression and following rules. She is bonding well with the foster family and her two siblings. The foster family makes certain she is receiving medical attention as needed and also assists her with recovering from developmental delays in language. The foster family is considered as a potential adoptive placement for all three children. We are not sure what if any adoption subsidy the prospective parents may receive if they adopt the children.

All three children have been out of their parents' care since February of 2009 and need consistency and stability. None of the placements suggested by the mother want to be a placement for all three children. The mother focuses primarily on the Hences, but Gloria indicated all she really wanted was the youngest girl, although she testified to a willingness to take all three children.

Home studies on the father's mother and sister in Michigan had not been completed by the time of the termination hearing. To continue to keep the children in long-term foster care is not preferred to termination of parental rights. *In re R.L.*, 514 N.W.2d 900, 903 (Iowa Ct. App. 1995). Guardianships are subject to re-litigation and would not afford the children the stability and permanency they need and deserve.

The parents have a long history of leaving their children with other caretakers for long periods of time, sometimes several years, so they can pursue their lifestyle of substance abuse. The evidence clearly shows the detrimental effects of this lack of stability and permanency on the children. During supervised visits, the mother was variously telling the children they would be placed with the Hences, would return to her care, or would be placed with other relatives. This caused repeated disappointment. By the summer of 2010, K.F. was refusing to participate in visits with her mother. She expressed a desire to be adopted by the foster parents.

"In considering 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.'" *In re P.L.*, 778 N.W.2d 33, 39 (Iowa 2010) (quoting Iowa Code section 232.116(2)). Given the past actions of the parents, guardianship in lieu of termination is not appropriate. It would only leave the children in limbo and would not be "the best placement for furthering the long-

term nurturing and growth of the child[ren], and to the physical, mental, and emotional condition and needs of the child[ren].” Iowa Code § 232.116(2).

At the time of the termination, the Hences and the K.F.’s paternal relatives in Michigan were pursuing being qualified as potential adoptive placements. The juvenile court found:

The present [foster] home is a concurrent home for these children. This foster family has gone to extraordinary measures to settle these children into their home and to respond to the extreme needs of the children, Despite the fact that [Ric.B.] and [Rik.B.] have mental health issues, the children are adoptable. The foster family has been a supportive family for [Ric.B.] during his placement for mental health treatment and their home is open to him upon his discharge. Various paternal and maternal family members as well as close family friends have expressed an interest in one or more of the children. These homes could also serve an adoption option. The guardian ad litem and the children [and the department] all support keeping the children together.

Under the circumstances before us, we cannot find that “termination of the parent-child relationship would not be in the best interest of the child[ren].” Iowa Code § 232.104(3)(a). Consequently, establishing permanency through a guardianship is not appropriate. See *id.* § 232.104(3). We agree with the juvenile court that termination of the parents’ parental rights and making the children available for adoption instead of extending the disruption in their lives by establishing permanency through placing them in the guardianship of relatives or family friends better serves the children’s immediate and long-term interests. See *In re C.K.*, 558 N.W.2d 170, 172 (Iowa 1997); *In re L.L.*, 459 N.W.2d 489, 493 (Iowa 1990). We affirm on this issue.

AFFIRMED ON BOTH APPEALS.