

IN THE COURT OF APPEALS OF IOWA

No. 1-235 / 11-0153
Filed May 25, 2011

**IN THE INTEREST OF L.B., Jr.,
Minor Child,**

M.B., Mother,
Appellant,

L.B., Sr., Father,
Appellant.

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

A mother and father appeal the juvenile court's order terminating their
parental rights to their child. **AFFIRMED.**

Lauren M. Phelps, Davenport, for appellant mother.

Margaret M. Moeller and Maria K. Pauly of Wehr, Berger, Lane & Stevens,
Davenport, for appellant father.

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

Dana L. Copell, Davenport, guardian ad litem for minor child.

Martha L. Cox, Davenport, attorney for minor child.

Considered by Sackett, C.J., Potterfield, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

POTTERFIELD, J.**I. Background Facts and Proceedings.**

Marcella and Louis are the parents of the child at issue in this appeal. The child was eleven at the time of the order terminating both parents' parental rights. The child is described as extremely low-functioning, with physical and behavioral problems. During the pendency of these proceedings, the child also had problems with soiling himself.

The family came to the attention of the Iowa Department of Human Services (DHS) in September 2008 because of child protective concerns resulting from domestic violence between the child's parents.¹ The child reported feeling a need to protect his mother from his father's violence. The incident resulted in a founded child abuse report against Louis for denial of critical care. Initially, Marcella admitted to the incident of domestic violence and obtained a protection order against Louis.

On March 30, 2009, a second assessment was initiated due to a report that Louis had made the child and the child's step-brother, who lived with the family at the time, watch him masturbate. DHS requested that the parents consent to voluntary placement of the child in foster care, and the parents agreed. The child was removed the same day.

The child and his step-brother both informed DHS caseworkers that they had walked in on Louis masturbating, but their reports indicated this was accidental. The children also both reported seeing Louis view pornography on

¹ The family had also received services from April through November of 2007 because of unsanitary living conditions in the home. These issues were resolved by the time the present case was opened.

his computer. During the investigation into this incident, Marcella recanted her previous statements regarding physical abuse and denied any domestic abuse had ever occurred between her and Louis. Louis also denied any abuse. The incident on March 30 resulted in a founded child abuse report against Louis for denial of critical care. However, an allegation of sexual abuse was not confirmed.

On July 17, 2009, the child was adjudicated a child in need of assistance (CINA) based on the domestic violence between the parents and the incident involving Louis masturbating in front of the child.

Following the adjudication, both parents began participating in services under the case plan including supervised visits, individual therapy, parenting education classes, and a batterer's education program for Louis. Though at first the parents made slow progress, in the spring of 2010, they started to engage more meaningfully in services. The parents began overnight visits in early July, and the reports from everyone involved were positive.

A permanency hearing was scheduled for August 25, 2010. According to the juvenile court, it was anticipated that a reunification would occur at that time. Both the DHS caseworker assigned to this family and the child's guardian ad litem recommended returning the child to his parents' custody with supervision of DHS. The child's therapist noted that the child had made significant progress and his soiling problem was resolved. The child expressed excitement about returning home.

On the morning of August 25, 2010, DHS received a report alleging sexual abuse of the child by Louis. In light of this report, the juvenile court continued the permanency hearing pending completion of an investigation into the matter.

The report involved statements from the child's step-brother that he had witnessed Louis digitally penetrating the child's anus. The DHS notes state, "There was a hint that his mother was involved, but this was not specified clearly." The step-brother alleged this incident occurred in a residence in which the family resided prior to the involvement of DHS in the present case.

DHS spoke with the step-brother on several occasions, and his reports contained inconsistencies. In addition, his reports were not entirely consistent with statements made by the child during conversations with DHS. The step-brother was fourteen years old when he spoke with DHS and was also low-functioning.

The incident resulted in two founded reports of sexual abuse against Louis, one involving the child and one involving the step-brother. Reports of sexual abuse against Marcella were unfounded. Louis denied he had ever touched either child inappropriately. Marcella explained that she had spoken with the step-brother's father a few days before court and informed him that she and Louis were going to "get [the step-brother] back in her care too."² She explained to DHS that the step-brother's guardian did not like her and probably asked the step-brother to create this story to prevent her from receiving custody of both the child and his step-brother.

² At the time, the step-brother, Marcella's biological child, resided with his paternal aunt, who was his guardian.

In a permanency order filed October 6, 2010, the juvenile court noted that because this incident had not come to light earlier, services offered to the family had not addressed the offending behavior or the victimization of the child. The court stated, "Because neither the child nor parent was forthcoming as to those issues, we are starting over. The problem is that the child has now been out of the home 18 months." The court determined the child needed stability and permanency and ordered that a petition for termination of parental rights be filed.

After a hearing on the matter, on January 21, 2011, the juvenile court terminated both parents' rights to the child pursuant to Iowa Code section 232.116(1)(d), (e), (f), and (i) (2009). Both parents now appeal, asserting the State did not prove by clear and convincing evidence that grounds for termination existed. Both parents also argue that termination of their parental rights is not in the child's best interests, given the parents' bond with the child and the child's desire to return to their care.

II. Statutory Grounds.

On our de novo review, we affirm the juvenile court's termination of each parent's parental rights pursuant to section 232.116(1)(f). See Iowa R. App. P. 6.907; *In re R.K.*, 649 N.W.2d 18, 19 (Iowa Ct. App. 2002) ("We only need to find grounds to terminate parental rights under one of the sections cited by the juvenile court in order to affirm its ruling."). Section 232.116(1)(f) provides the court may terminate a parent's rights when all of the following have occurred: (1) the child is four years of age or older; (2) the child has been adjudicated CINA; (3) the child has been removed from physical custody of the parents for the last twelve consecutive months; and (4) there is clear and convincing

evidence the child cannot be returned to the custody of the parents at the present time. The first three elements are not disputed.

We find the child cannot be returned to either parent's custody at the present time. We acknowledge that by August 2010, the court and service providers involved in this case supported reunification of the child with his parents in light of the parents' significant improvement and success with extended visitation. However, the new child abuse assessment opened in August 2010 along with the accompanying founded reports of sexual abuse dramatically changed the nature of this case. Given the founded reports of sexual abuse, services would need to be provided to the parents and to the child to address this issue. Unfortunately, services provided during the course of these proceedings did not address the type of abuse that was brought to light in August 2010. Because the behavior that led to the two founded sexual abuse reports was never addressed, the child cannot safely be returned to Louis's care at the present time.

We also determine the child cannot be returned to Marcella's care at the present time. In a meeting on September 10, 2010, between Marcella, her attorney, and a DHS worker, Marcella's attorney advised her, as the attorney claimed to have done one year ago, that it was in her best interests to separate from Louis. Her attorney informed her that because there was enough information to found a report against Louis for sexual abuse, there was "no way" the court or DHS would return the child home if Louis were there. The DHS caseworker involved also told Marcella that the chances of the child going home with Louis there were "almost zero." In spite of this advice, Marcella remained

with Louis and continued to deny that he had ever touched the child inappropriately. Though we believe Marcella truly loves the child, we conclude that she is unable to recognize the serious danger her child is exposed to and is therefore unable to remedy the situation. *In re H.R.K.*, 433 N.W.2d 46, 50 (Iowa Ct. App. 1988) (finding a parent must acknowledge and recognize abuse before any meaningful change can occur). Accordingly, the child cannot safely be returned to her custody at the present time.

We find clear and convincing evidence supports the juvenile court's termination of each parent's parental rights pursuant to Iowa Code section 232.116(1)(f).

III. Best Interests of the Child.

We next consider the factors listed in Iowa Code section 232.116(2) to determine whether termination is in the child's best interests. Each parent argues a termination of parental rights is not in the child's best interests. "The primary considerations are 'the child's safety,' 'the best placement for furthering the long-term nurturing and growth of the child,' and 'the physical, mental, and emotional condition and needs of the child.'" *In re P.L.*, 778 N.W.2d 33, 37 (Iowa 2010). Though we acknowledge that at the time of trial DHS had not located a permanent home for the child, we conclude that given the unaddressed issues concerning sexual abuse by Louis, placing the child back in the care of either parent does not provide for the child's safety, long-term nurturing and growth, or physical, mental, and emotional needs. In light of the recent founded sexual abuse report against Louis listing the child as the victim, we determine Louis cannot provide for the child's best interests, and, as discussed above,

Marcella has not demonstrated an understanding of the risk Louis presents to the child and is therefore also unable to provide for the child's best interests.

Finally, we consider whether any of the factors listed in Iowa Code section 232.116(3) apply. The court need not terminate the relationship between a parent and child if any of these conditions exist. Iowa Code § 232.116(3). The factors in section 232.116(3)(c) are permissive, and it is in the court's discretion, based on the unique circumstances of the case and the best interests of the child, to apply such factors. *In re A.J.*, 553 N.W.2d 909, 916 (Iowa Ct. App. 1996).

Each parent argues on appeal that the child is bonded to his parents and expressed a clear desire to return to their custody. See Iowa Code § 232.116(3)(b), (c). We find no abuse of discretion in the circumstances before us. The child's therapist reported the child was confused and disappointed after the permanency goal for the family was changed. However, she reported that by January 2011, the child was "inconsistent about his feelings toward continued visits" with his parents. His therapist noted he "appears ambivalent to his parents and the little that he does speak about visits or his parents (his father in particular) have not been positive." The child specifically expressed to care providers that he did not want to have visits with his father. Accordingly, we conclude the record does not show clear and convincing evidence that the termination would be detrimental to the child due to his bond with either parent. See *id.* § 232.116(3)(c). Also, we are unable to conclude the child objected to the termination as required by section 232.116(3)(b).

Accordingly, we affirm the juvenile court's termination of both parents' parental rights.

AFFIRMED.

Miller, S.J., concurs; Sackett, C.J., dissents.

SACKETT, C.J. (dissenting)

I fail to find it is in the child's best interest to terminate his parental rights. There is no evidence an adoptive home has been found for him, nor can one assume that one will be. He has a bond with his parents, most particularly his mother, who has made serious efforts to regain her custody of him. While his parents may not be able to accept custody, they can maintain a relationship with him. I am unable to join the majority in making this child an orphan and take him from his biological family and the right to financial support from his parents.