

IN THE COURT OF APPEALS OF IOWA

No. 1-247 / 11-0339
Filed April 27, 2011

**IN THE INTEREST OF T.H., A.H., C.H., and D.H.
Minor Children,**

**D.L.H., Mother,
Appellant.**

Appeal from the Iowa District Court for Jackson County, Phil Tabor,
Associate Juvenile Judge.

A mother appeals from the order waiving reasonable efforts and the order
terminating her parental rights. **AFFIRMED IN PART; REVERSED IN PART.**

Scott J. Nelson, Dubuque, for mother.

Thomas J. Miller, Attorney General, Janet L. Hoffman, Assistant Attorney
General, and Christopher Raker, County Attorney, for appellee.

Stuart Hoover, Dubuque, attorney and guardian ad litem for minor
children.

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

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

SACKETT, C.J.

A mother appeals from the order waiving reasonable efforts and the order terminating her parental rights¹ to four children. She contends the court erred in finding aggravated circumstances existed to support a waiver of reasonable efforts and thus to terminate her parental rights. We affirm in part and reverse in part.

BACKGROUND. The parents have three biological children, T.H., A.H., and C.H., born in 1998, 1999, and 2001 respectively, and adopted² two younger half-siblings, D.H, born in 2003, and C.H., who was four years old at the time of his death. The children were removed from their parents' care in June of 2010 after C.H., the younger of the two adopted children, drowned³ in the bathtub at home. Both parents consented to the removal after they were arrested and charged concerning the child's death.⁴ The mother has remained in jail pending trial set for April of 2011. The juvenile court ordered that the mother have no contact with the children.

The State filed a motion to waive reasonable efforts. The motion came on for hearing in January of 2011. The court heard testimony from Dr. Resmiye Oral, M.D., director of the Child Protection Program at the University of Iowa Children's Hospital and Lynn Bell, supervisor with the Department of Human

¹ The father died after the children's removal, but before the contested disposition hearing in October.

² The biological mother of the adopted children is the sister of the father in this case.

³ After his arrest, the father stated he saw the mother holding the child's head under water and slamming the back of the child's head against the tub.

⁴ The mother was charged with first-degree murder and child endangerment of D.H. The father was charged with child endangerment resulting in death.

Services, took judicial notice of the exhibits received in the adjudication proceedings, and received exhibits from the State. In the order waiving reasonable efforts, the court found:

Based on the specific facts of this case as contained in the exhibits and other evidence, there is clear and convincing evidence to establish that there are aggravated circumstances in this matter which allow for the waiver of reasonable efforts. The court FINDS that one child in the home is dead, another child in the home was subject to torture, and three of the other children in the home witnessed both the death and the torture. The court can find that all four living children suffered as a result of this, and the court can find there is no reasonable belief that the conditions which led to the abuse or neglect can be remedied through services in a reasonable amount of time.

The State subsequently petitioned to terminate the mother's parental rights to all four children under Iowa Code section 232.116(1)(d), (e), and (i) (2011). After a hearing on the petition, the court found:

All children were adjudicated to be in need of assistance on September 10, 2010. The basis for the adjudication of child in need of assistance was a result of physical abuse in the home. The court can find that as a result of the physical abuse, another child in the home, [C.H.] died as a result of the abuse. [D.H.] was subject to torture over many months and that [the three biological children] were present while the torture of [D.H.] and the death of [C.H.] occurred. . . . The court also is aware that while it is clear that the torture that occurred to [D.H.] and his brother . . . only occurred to them and there is no allegation that it occurred to [the biological children], the court is fully aware of the testimony in this case of Dr. Oral, who testified at the waiver of reasonable efforts hearing, that it will take years for these children to overcome what they have observed and what they have lived through in their home.

. . . .
 . . . The court finds from the testimony of Dr. Oral . . . that failure to terminate on the biological children, even the 12 and 11 year olds, would be a disservice to those children. The horrific nature of the abuse in this case requires termination for the future rehabilitation of all children involved. The Guardian Ad Litem recommends termination of parental rights

The history of this case clearly demonstrates that all the children in this case suffered from witnessing or being part of the

torture that resulted in the death of one of their siblings, and the court believes that failure to terminate parental rights would be contrary to the welfare of the children, as the termination of parental rights is the only reasonable means to establish permanency for the children.

The mother appeals, contending the court erred in finding aggravated circumstances and in terminating her parental rights.

SCOPE AND STANDARDS OF REVIEW. 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). Our review is de novo. Iowa R. App. P. 6.907; *In re B.B.*, 598 N.W.2d 312, 315 (Iowa Ct. App. 1999). The State has the burden to prove by clear and convincing evidence the aggravated circumstances that justify waiving reasonable efforts and the statutory grounds for termination of parental rights. Iowa Code §§ 232.102(12); 232.116(1)(e), (i); *In re P.L.*, 778 N.W.2d 33, 34, 39 (Iowa 2010). Although we give weight to the findings of fact, we are not bound by them. *In re J.A.D.-F.*, 776 N.W.2d 879, 883 (Iowa Ct. App. 2009).

MERITS. The mother contends the court erred in finding by clear and convincing evidence that aggravated circumstances exist to support waiver of reasonable efforts and thus erred in terminating her parental rights.

Aggravated Circumstances. Concerning the finding of aggravated circumstances, the mother argues the only paragraph in section 232.102(12) that might be applicable here is (b), which provides, “The court finds the circumstances described in section 232.116, subsection 1, paragraph ‘i’, are

applicable to the child.”⁵ She then notes the statutory language in section 232.116(1)(i) requires the court to find “that all of the following have occurred:”

(1) The child meets the definition of child in need of assistance based on a finding of physical or sexual abuse or neglect as a result of the acts or omissions of one or both parents.

(2) There is clear and convincing evidence that the abuse or neglect posed a significant risk to the life of the child or constituted imminent danger to the child.

(3) There is clear and convincing evidence that the offer or receipt of services would not correct the conditions which led to the abuse or neglect of the child within a reasonable period of time.

Iowa Code § 232.116(1)(i)(1)-(3).

The juvenile court and this court are faced with appalling facts of terrible physical abuse of the two youngest children, one of whom died as a result. However, no evidence of such physical abuse of the three older children was presented to the court that would permit the waiver of reasonable efforts under Iowa Code section 232.102(12)(b) and its reference to section 232.116(1)(i).⁶ The threshold finding for waiver of reasonable efforts under section 232.116(1)(i) requires that “[t]he child meets the definition of child in need of assistance based on a finding of physical or sexual abuse or neglect as a result of the acts or omissions of one or both parents.” Although D.H. was abused physically, it does not appear the three older children were abused physically or sexually, but “were present” in the home while the abuse occurred. Consequently, neither the

⁵ We note that subsections (d), (e), (f), (g) provide for waiver of reasonable efforts when a parent has been *convicted* of murder, manslaughter or assault of a child. This parent had been charged, but not convicted by the time of the termination.

⁶ The district court did not specifically identify the statutory ground for waiving reasonable efforts, but the only ground that could conceivably apply to the facts of this case is section 232.102(12)(b). Depending on the result of the mother’s criminal trial, one of the paragraphs (d), (e), (f), or (g) might apply.

juvenile court nor we can make the threshold finding concerning the three older children that would support a waiver of reasonable efforts. We reverse the waiver of reasonable efforts as to the three older children.

The mother argues the court made no specific finding the mother was the perpetrator of the abuse. We conclude the language only requires the abuse to be “as a result of the acts or omissions of one or both parents.” We find clear and convincing evidence the abuse of the younger children was a result of the acts or omissions of the mother. See Iowa Code § 232.116(1)(i)(1).

The mother argues the court made no finding the abuse of D.H. “posed a significant risk to the life of the child or constituted imminent danger” to him. We conclude the court’s findings concerning the death of D.H.’s younger half-sibling, the clear abuse and torture of D.H. revealed by the medical examination, and the evidence D.H. and the deceased child were singled out for abusive treatment are sufficient to satisfy at least the “imminent danger” requirement in section 232.116(1)(i)(2).

We affirm the order waiving reasonable efforts as to D.H. but reverse the waiver as to the three older children, T.H, A.H., and C.H.

Termination. The juvenile court terminated the mother’s parental rights under Iowa Code section 232.116(1)(d), (e), and (i). She does not directly challenge any of the statutory grounds for termination or even cite to them in her argument. We affirm the statutory grounds for termination as to D.H.

Having determined the court properly decided to waive reasonable efforts as to D.H. and that statutory grounds exist for termination as to D.H., we affirm

the juvenile court's orders as to D.H. Concerning the three older children, however, we have determined the juvenile court improperly waived reasonable efforts as to them. Consequently, the State could not pursue termination of the mother's parental rights as to these children because it was not fulfilling its statutory mandate to make reasonable efforts to reunify the mother with these children. Accordingly, we reverse the termination of the mother's parental rights as to the three older children, T.H., A.H., and C.H.

AFFIRMED IN PART; REVERSED IN PART.