

IN THE COURT OF APPEALS OF IOWA

No. 1-252 / 11-0303
Filed May 11, 2011

**IN THE INTEREST OF L.K. and Z.K.,
Minor Children,**

**S.L.S., Mother,
Appellant,**

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

Appeal from the Iowa District Court for Linn County, Barbara H. Liesveld,
District Associate Judge.

A mother and father appeal separately from the order terminating their
parental rights. **AFFIRMED ON FATHER'S APPEAL; REVERSED AND
REMANDED ON MOTHER'S APPEAL.**

Deborah Skelton, Walford, for appellant mother.

Jeannine Roberts, Cedar Rapids, for appellant father.

Thomas J. Miller, Attorney General, Kathrine Miller-Todd, Assistant
Attorney General, Jerry Vander Sanden, County Attorney, and William Croghan,
Assistant County Attorney, for appellee State.

Angela Railsback, Cedar Rapids, for minor children.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

DANILSON, J.

A mother and father appeal from the order terminating their parental rights to their two children, L.K. and Z.K., ages eight and five-years-old. Both parents argue the State failed to prove the grounds for termination by clear and convincing evidence and that termination is not in the children's best interests. Given the father's history of instability, aggressive behaviors, and mental health concerns, we affirm termination of his parental rights. In regard to the mother, we find there is insufficient evidence to justify the termination of her parental rights to the children under the facts and circumstances of this case. We reverse the court's order terminating the mother's parental rights and remand the case for further proceedings to make an effort to reunite these children with the mother.

I. Background Facts and Proceedings.

The father had an unstable childhood and had multiple residences. He served seventeen months in a juvenile detention facility for theft. In 1992, he was charged with robbery in the first degree, and served nine years in prison. He met the mother in 2001, when he was twenty-eight years old, and the mother was sixteen-years-old.

L.K. was born in 2002. The mother and father married in 2003. The marriage became difficult. The father was either unemployed, or only temporarily employed. He exhibited explosive, aggressive, and confrontational behaviors. The family lost their housing and moved from residence to residence. Z.K. was born in 2006.

In March 2008, the mother kicked the father out of the house after he used L.K. as a "look-out" while he stole video games. She kept the children until April

2008, when the father took them and told the mother she would never see them again. He had the children approximately seven or eight months, and then returned them to the mother.

The family came to the attention of the Iowa Department of Human Services in January 2009, when a child abuse assessment was initiated due to allegations the children were exposed to the mother's drug usage in the home and the mother allowed people who were under the influence of alcohol and drugs to transport the children. The parents were going through tumultuous divorce and custody proceedings at the time. There was a no-contact order in place between them, and police were called on a regular basis. The children were adjudicated in need of assistance (CINA) in March 2009.

The father also reported incidents of physical abuse by the mother to Z.K., but these reports were unfounded. In April 2009, hair stat testing was ordered on both children following the father's allegations the mother allowed the children to be around people using drugs. In May 2009, DHS received the hair stat testing results. L.K. tested negative, but Z.K. tested positive for cocaine. The mother denied exposing the children to drugs and suggested the maternal grandmother was responsible.¹ The children were removed on May 11, 2009, and have not been returned to the care of either parent since that time. The parents divorced in July 2009.

Shortly after the removal, the mother tested positive for marijuana. She denied she ever used marijuana. All other drug screens have been negative.

¹ According to the mother, the maternal grandmother is a recovering drug addict, and has since moved back to Chicago.

The mother was employed part-time as a cafeteria cashier for the Cedar Rapids Community School District. She was employed in that capacity for approximately three years, but failed to apply for required summer maintenance work and her employment was discontinued. She lost her housing in Cedar Rapids.

The mother moved to Waterloo in early September 2009, against the advice of caseworkers. The mother wanted a fresh start for her and the children, away from the turmoil and drama caused by her divorce from the father. She moved in with some friends, but did not disclose her location to DHS, because her friends did not want any involvement with DHS. The mother admitted her failure to disclose who she was living with “would be a red flag” to DHS, but insisted the friends were not “engaged in anything criminal or in any sort of drug activity.”

The mother did not have any visits with the children until December 26, 2009. She did write them letters. The mother requested visitation, but “understood” DHS was hesitant to take the children to Waterloo without knowing who she was living with. She did not have transportation to visit the children in Cedar Rapids.

The mother obtained employment at Tyson’s. After living with her friends for five months, she was able to get her own apartment. Visitation took place at the mother’s apartment. Unfortunately, the mother was laid off from Tyson’s after several months, through no fault of her own. She was able to live in her apartment for three months until she could no longer pay rent, and moved in with her friends again. The mother continued to have consistent visitation with the children in Cedar Rapids.

The mother moved back to Cedar Rapids in August 2010 and began living with her uncle and his eight-year-old daughter in a two-bedroom apartment. By that time, she was having semi-supervised visitation with the children two days per week.

The mother was pregnant again and was expecting a baby in October 2010. She planned to seek employment and permanent housing within two months after the birth. Until then, she believed the children could be placed with her and share a bedroom with her uncle's daughter.

The father admitted he has held many jobs but was always fired due to conflicts with his bosses. Specifically, the father reported he has had forty to fifty jobs in the past and all lasted no longer than approximately one month. The father has completed several mental health evaluations and has been diagnosed with adjustment disorder and probable antisocial personality disorder, intermittent explosive disorder, personality disorder not otherwise specified, with antisocial and paranoid features, and a history of seizures. Although prescription medication was recommended, the father failed to take medication and failed to follow through with counseling. He became explosive and volatile toward a mental health provider when he perceived a lack of communication in regard to scheduling of sessions. The evaluator noted:

DHS was concerned about the father's repeated altercations with others as it may reflect the lack of effective communication skills and emotion regulation, which are important qualities in the context of parenting. In the evaluation, the father evidenced a number of limitations that could compromise the quality of parenting significantly. For example, he has difficulty managing stress and intense emotions and his anger and hostility have led him to engage in aggressive behaviors towards others on numerous occasions. He has made poor decisions in the past and it is likely

he will continue this pattern of behavior unless it is fully addressed in treatment. Although the client has acknowledged that his aggressive behavior is destructive and has maintained stable employment for the past six months, it remains unclear to what extent these demonstrate ongoing efforts to make fundamental changes, that is, how long will he be able to sustain this behavior.

The father had regular visits with the children. He consistently requested additional visitation. Visits increased to semi-supervised in February 2010. However, in May 2010, visits moved back to fully supervised after the children's behavior worsened. DHS declined to increase visitation, due in large part to L.K.'s reports that she did not feel safe with him without a provider present.

Following a hearing over four days in September and October 2010 and January 2011, the court entered its order terminating the mother's and father's parental rights pursuant to Iowa Code section 232.116(1)(f). The parents now appeal.

II. Standard of Review.

We review termination proceedings de novo. *In re Z.H.*, 740 N.W.2d 648, 650-51 (Iowa Ct. App. 2007). Although we are not bound by them, we give weight to the district court's findings of fact, especially when considering the credibility of witnesses. Iowa R. App. P. 6.904(3)(g); *In re M.M.S.*, 502 N.W.2d 4, 5 (Iowa 1993). 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). The State has the burden of proving the grounds for termination by clear and convincing evidence. *In re P.L.*, 778 N.W.2d 33, 34, 39 (Iowa 2010); *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006). If a statutory ground for termination

exists, termination is in the child's best interests, and no factor weighing against termination exists, we will affirm. *P.L.*, 778 N.W.2d at 39.

III. Grounds for Termination.

Both parents contend clear and convincing evidence does not support termination under section 232.116(1)(f). Termination is appropriate under that section where the State has proved the following:

- (1) The child is four years of age or older.
- (2) The child has been adjudicated CINA.
- (3) The child has been removed from the physical custody of the parent for at least twelve of the last eighteen months.
- (4) There is clear and convincing evidence that the child cannot be returned to the custody of the child's parents at the present time.

Iowa Code § 232.116(1)(f). There is no dispute the first three elements have been proved as to both parents. Our inquiry therefore focuses on whether there is clear and convincing evidence the children cannot be returned to the care of either parent at the present time. *See id.*

Father. The father argues “[n]o evidence was presented that showed he was a danger to his children or anyone, or that his actions would cause adjudicatory harm to the children.” He also sets forth a number of mistakes in the court's order, and states “[e]verybody in the case agreed that he had never been physically aggressive with anybody.”

However, the record is replete with evidence of the father's “aggressive,” “volatile,” and “confrontational” behavior. Although the father seems to suggest that being merely “verbally” aggressive is acceptable, we disagree. Further, many of the father's actions also exhibited physical aggression.

For just a few examples, as the court noted, “in the summer of 2008, the father was arrested and convicted of harassment due to an altercation with his daughter’s baby-sitter.” As the court observed, the father has a “well-documented history of exhibiting threatening behaviors towards others with criminal involvement,” including serving nine years in prison for robbery in the first degree. A no-contact order was also entered by the court between the parents.

After a hearing in March 2009, “[u]pon hearing the judge’s ruling, he ‘lost it’ and became aggressive towards others in the court.” The father also “raised his voice and expressed frustration” and “displayed volatile affect in response to what he had perceived to be a lack of communication” by a mental health provider. As the provider observed:

[I]nformation obtained from the clinical interview, as well as behavioral observations, indicated rigid thinking patterns characterized by suspicion, distrust and hypersensitivity to criticism . . . based on the father’s report, he had a tumultuous adolescence characterized by oppositional, erratic and illegal behavior, as well as unstable relationships and frequent changes in living arrangements. . . . The father reported he has particular difficulty maintaining good relationships with his superiors. He acknowledged that his lack of control over his behavior when experiencing intense emotions has led to his termination from several jobs. The father described becoming very angry in situations in which he perceives that he is being treated unfairly by his coworkers and superiors. Based on his account of the situation, he often ruminates about the motivations of others and “cannot help” but outwardly express his anger by becoming irritable and argumentative.

The father has been offered extensive remedial, family support, visitation, and mental health treatment services since early 2009. We acknowledge the father has maintained stable housing for more than one year and has been

employed for six months. His employment recently became full-time. Despite this progress, the fact remains that the father's unstable behavior creates an unhealthy situation for the children's development.

The children's behaviors became more oppositional and aggressive when visits were semi-supervised. L.K. started stealing at school again, and Z.K. wet her pants. The court noted that "[b]oth girls seem to think that angry behavior is acceptable, even if someone gets physically hurt." The children have expressed a desire to remain in their current placement and have specifically noted their fear of the father. Caseworkers believe the father's behavior could emotionally harm the children. The children have been affected by the negative interactions between their parents, and the explosive and aggressive behavior of their father, for many years.

In sum, the father has not shown consistent and significant improvement in his ability to safely and effectively parent these children. The children need and deserve permanency and security, and they cannot find that with the father. We agree with the court that the record contains clear and convincing evidence the children cannot be placed in the father's care, and affirm the termination of the father's parental rights.

Mother. The mother contends the court's termination order is "riddled with mistakes" and argues there is no evidence the children could not be returned to her care. She states if her five-month-old baby who is "infinitely more vulnerable" than L.K. and Z.K. is not a CINA, "then surely no harm exists which would justify the adjudication of L.K. and Z.K. as CINA if placed with their mother."

At the outset, we note our concern with the mother's decision to move from Cedar Rapids in September 2009, against the advice of caseworkers, and disrupt visitation with the children for a period of more than four months. We are also troubled by the mother's decision to move in with friends, and for whatever reason, not disclose to DHS where she was living.

Caseworkers cited the mother's actions during that time period, coupled with her inability to obtain permanent housing in Cedar Rapids at the time of the termination hearing, as basis for criticism of her "instability," and as the primary reasons for recommending termination of her parental rights. As social worker Amy Fields testified:

In regards to [the mother], I think she does a great job parenting. I think her interactions with the children, that I've seen personally and that I've read about in reports, are appropriate. I think that she's able to discipline her children and interact in an appropriate manner. The parenting has never been a concern with me for the mother.

My concern with the mother is her inability to give me the names of the people that she was living with and associating with when she was in Waterloo, her abrupt decision to move to Waterloo when we were trying to reunify her children with her here in Cedar Rapids, her instability of housing right now. I guess that's an issue that we are seeing now.

And I hope she does get a place here in Cedar Rapids. I just think that that delay of working towards getting the kids home for that year really affected returning the kids to her.

We agree that some of the mother's actions show poor and immature judgment, and may have, in fact, delayed her reunification with the children. This is a difficult case. However, upon our careful and thorough review of the record, we do not find clear and convincing evidence to support a finding that these children cannot be returned to the mother's care.

The majority of the concerns expressed by the court and caseworkers about the mother are related to her ability to obtain stability and security in terms of housing and employment. Poverty alone is not a sufficient reason to terminate parental rights. *In re Z.T.D.*, 478 N.W.2d 426, 428 (Iowa Ct. App. 1991). It is clear the mother is without sufficient financial resources to care for three children. She does have a temporary place to live (in her uncle's apartment), and apparently, there is a bunk-bed the children could sleep on in the bedroom they would share with the uncle's eight-year-old daughter. The mother testified she had applied for permanent housing and was on several wait-lists.

The mother has applied to receive a FIP payment. In addition, she was optimistic about her ability to find employment, and testified there are "a lot of people looking for cashiers." As the mother's employment history evidences, and caseworkers agreed, the mother has a good work ethic. In addition, L.K. and Z.K. are in school and do not have full-time childcare expenses.

In terms of her ability to parent the children, there is no dispute amongst caseworkers that the mother has good, if not great, parenting skills. The mother now has her newborn infant in her care. DHS has no concerns about the care of that child. L.K. and Z.K. have specific behavioral and learning needs, and the mother is aware of these challenges. In fact, the mother experienced many of these difficulties during her childhood and is arguably the best person to help her children with these same issues. No one disagreed that there is a bond between the mother and the children.

For these reasons, we find there is inadequate evidence in this record to support the termination under the statutory provision cited by the court. We find

the circumstances that led to the adjudication no longer exist, and there is not clear and convincing evidence that the children are unable to be returned to the mother's care at the present time. The order terminating the mother's parental rights should be reversed, and the case remanded for increased visitation with the goal for reunification to occur as soon as possible.

IV. Best Interests.

Both parents contend termination is not in the children's best interests. Even if a statutory ground for termination is met, a decision to terminate must still be in the best interests of a child after a review of Iowa Code section 232.116(2). *P.L.*, 778 N.W.2d at 37. In determining best interests, this court's 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." *Id.*

Taking these factors into account, we conclude the children's best interests require termination of the father's parental rights. The children are in need of permanency and security, and the father is not able to provide for the children's long-term nurturing and growth. Termination of father's parental rights is in the children's best interests, see Iowa Code § 232.116(2), and no factor weighing against termination in section 232.116(3) requires a different conclusion.

However, we conclude termination of the mother's parental rights is not in children's best interests. It also is clear the mother and children share a strong bond. See Iowa Code § 232.116(3)(c). For the majority of these proceedings, the mother has had consistent visitation with the children several times a week.

Visitation has taken place most recently at her uncle's apartment and was appropriate. The children are high energy and need lots of attention. The mother has shown the ability to discipline the children and give them love and affection. The children respond well to the mother. The mother is competent and aware of the children's educational and medical needs. Upon consideration of the safety of the children and "the physical, mental, and emotional condition and needs" of the children, we conclude the mother is the "best placement for furthering the long-term nurturing and growth" of the children. *See id.*

V. Conclusion.

Under the facts of this case, including the father's history of instability, aggressive behaviors, and mental health concerns, we affirm termination of his parental rights.

Upon our review, we find there is insufficient evidence to justify the termination of the mother's parental rights to the children. We reverse the court's order terminating the mother's parental rights, and remand the case for further proceedings to make an effort to reunite these children to the mother.

AFFIRMED ON FATHER'S APPEAL; REVERSED AND REMANDED ON MOTHER'S APPEAL.

Doyle, J., concurs; Sackett, C.J., concurs specially.

SACKETT, C.J. (concurring specially)

I concur with the majority opinion that there is clear and convincing evidence to support termination of the parental rights of the father. I write separately to express my concern that in terminating the rights of the father we may be relieving him of the obligation to support the child. The mother needs additional financial support, and the child's financial future may well be in jeopardy if the mother fails to receive child support.

The record shows the father was, at the time of the hearing, employed on a part-time basis and anticipated full-time employment. He has the ability to contribute financial support. In saying this I am not aware of statutory authority or Iowa case law specifically addressing the responsibility for support when a parent's parental rights are terminated, but it should be addressed.

Granted, if a child whose parental rights are terminated is adopted, then the adoptive parent or parents become responsible of the child's support. The problem is that a number of children whose parental rights are terminated are not adopted or, as here, only one parent is terminated. In these cases the responsibility for support should not be placed on the State, nor should a single parent have the entire obligation for support. I find it hard to justify relieving a biological parent or parents from all financial responsibility for a child because he or she had acted in a manner to support termination of his or her parental rights.

In *Department of Human Services v. Beck*, 793 N.W.2d 562, 563-64 (Mich. 2010), ("Beck II") the Michigan Supreme Court addressed a claim by a father that the trial court should not have entered an order requiring him to pay child support ordered in a dissolution decree after his parental rights were

terminated. The Michigan Court of Appeals had affirmed the trial court, reasoning that had the legislature intended the termination of parental rights also to terminate parental obligations, it could have easily said so. *In re Beck*, 788 N.W.2d 697, 699 (Mich. Ct. App. 2010). A panel of the court of appeals, having held that child support and parental rights are not interdependent, noted that parents are not denied parenting time simply because they are not able to pay child support. *Id.* The court also noted the child's inherent and fundamental right to receive support and that this right exists independently from whether a parent retains parental rights. *Id.*

The supreme court affirmed the court of appeals on a different basis. *Beck II*, 793 N.W.2d at 563. The court stated that Michigan statutory structure indicated the legislature's determination that parental rights are distinct from parental obligations and noted nothing in the statutory structure indicates that the loss of parental rights automatically results in the loss of parental obligation.² *Id.* at 563-64. Referencing Michigan Compiled Laws section 722.3 (2002), and saying, "unless a court of competent jurisdiction modifies or terminates the obligation," the court reasoned that the father had not shown the trial court abused its discretion. *Id.* at 566.

I recognize the issue of child support after termination of parental rights was not an issue here and there is an inadequate record to address it. However, it is an issue that is directly connected to the child's welfare, and there is nothing

² The California Court of Appeals reached the same result based on its statute and continued a father's support obligation after terminating his parental rights. *In re Marriage of O'Connell*, 146 Cal. Rptr. 26, 28 (1978).

in this decision that precludes the issue of fixing child support or continuing a child support order from being brought by the mother or the guardian ad litem.