

IN THE COURT OF APPEALS OF IOWA

No. 1-316 / 11-0305
Filed May 11, 2011

**IN THE INTEREST OF H.S. and S.N.,
Minor Children,**

**V.R., Mother,
Appellant.**

Appeal from the Iowa District Court for Polk County, Constance Cohen,
Associate Juvenile Judge.

A mother appeals the juvenile court's ruling terminating her parental rights
while her children are in the custody of their fathers. **REVERSED AND
REMANDED.**

Katherine A. Daman of The Powell Law Firm, P.C., Norwalk, for appellant
mother.

Michael J. Bandstra of Bandstra Law Office, Des Moines, for appellee
father of H.S.

William E. Sales of Sales Law Firm, P.C., Des Moines, for appellee father
of S.N.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney
General, John P. Sarcone, County Attorney, and Andrea Vitzthum, Assistant
County Attorney, for appellee State.

John P. Jellineck, Des Moines, attorney and guardian ad litem for minor
children.

Considered by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

POTTERFIELD, J.

Valarie is the mother of H.S. and S.N., both of whom are currently residing with their biological fathers¹ due to abuse inflicted upon H.S. by Valarie's husband, Tony, and Valarie's failure to protect them. The biological fathers filed petitions to terminate Valarie's parental rights when they disagreed with the September 2010 permanency order of the juvenile court that found compelling reasons not to terminate Valarie's parental rights. The permanency order continued custody of the children with their fathers, ordered Valarie to continue to pay child support, and continued the order for concurrent jurisdiction to allow the parties to litigate the custody issues in district court.

S.N.'s father sought termination pursuant to Iowa Code sections 232.116(1)(d), (f), and (i) (2009). H.S.'s father sought termination pursuant to sections 232.116(1)(h) and (i).²

¹ Charles is the biological father of H.S., and Stephen is the biological father of S.N.

² The relevant portions of section 232.116(1) provide as follows:

[T]he court may order the termination of both the parental rights with respect to a child and the relationship between the parent and the child on any of the following grounds:

....

d. The court finds that both of the following have occurred:

(1) The court has previously adjudicated the child to be a child in need of assistance after finding the child to have been physically or sexually abused or neglected as the result of the acts or omissions of one or both parents, or the court has previously adjudicated a child who is a member of the same family to be a child in need of assistance after such a finding.

(2) Subsequent to the child in need of assistance adjudication, the parents were offered or received services to correct the circumstance which led to the adjudication, and the circumstance continues to exist despite the offer or receipt of services.

....

f. The court finds that all of the following have occurred:

(1) The child is four years of age or older.

A five-day termination trial took place in November and December 2010, when the children were three and one-half years old and seven years old. On February 11, 2011, the juvenile court terminated Valarie's parental rights and ordered the children remain in the sole custody of their biological fathers. The court wrote:

[T]ermination of parental rights of one parent only is a severe remedy in a case where the permanency plan is for the fathers to retain custody of the children. The salient issue in this case is whether or not termination of parental rights is in the children's best interest and would be less detrimental than the harm that would be caused to them by continuing the parent/child relationships.

(2) The child has been adjudicated a child in need of assistance pursuant to section 232.96.

(3) The child has been removed from the physical custody of the child's parents for at least twelve of the last eighteen months, or for the last twelve consecutive months and any trial period at home has been less than thirty days.

(4) There is clear and convincing evidence that at the present time the child cannot be returned to the custody of the child's parents as provided in section 232.102.

....

h. The court finds that all of the following have occurred:

(1) The child is three years of age or younger.

(2) The child has been adjudicated a child in need of assistance pursuant to section 232.96.

(3) The child has been removed from the physical custody of the child's parents for at least six months of the last twelve months, or for the last six consecutive months and any trial period at home has been less than thirty days.

(4) There is clear and convincing evidence that the child cannot be returned to the custody of the child's parents as provided in section 232.102 at the present time.

i. The court finds 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.

Valarie appeals, arguing “[t]he circumstance which led to the adjudication of the children as children in need of assistance does not exist any longer” as the perpetrator of the physical abuse is in prison and she divorced him and thus the statutory grounds for termination have not been met. She also argues that termination is not in the best interests of the children.

We review de novo. See *In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010).

In late October 2009, two-year-old H.S. was discovered to have severe bruising on her backside and legs. An investigation by police and the Department of Human Services (DHS) determined Valarie’s husband, Tony, had inflicted those injuries. However, Valarie vigorously contested his responsibility.

Following a stipulated removal, the children were placed in the custody of their fathers. They remained in their fathers’ care at the time of the termination trial in November-December 2010.

The children were adjudicated children in need of assistance (CINA) on January 29, 2010. Valarie first contested adjudication, but then changed her position, conceding that Tony had physically abused H.S. A disposition hearing was held on March 2, March 31, and May 13, 2010. Valarie eventually stipulated to the recommendations made in the State’s permanency plan. Valarie testified under oath then that she had left Tony and had had no contact with him since the January 29, 2010 hearing. Valarie had filed for divorce, and agreed to pay child support to each of her children’s fathers. The juvenile court granted concurrent jurisdiction to pursue custody and visitation issues in district court.

DHS encouraged the parents to work out a plan to increase Valarie’s visitation with a goal toward a long-term custodial arrangement. Valarie was also

ordered to assure that her pit bulls, which had previously been aggressive with the children, would not be present during visitation, and to assure that Tony had no contact with the children.

On September 15, 2010, the court held a permanency hearing and granted the biological fathers sole legal custody of their children. The juvenile court—at that time—found compelling reasons not to terminate Valarie’s parental rights, including the financial support provided by Valarie and the placement of the children with their fathers.

The biological fathers shortly thereafter filed petitions to terminate Valarie’s parental rights. In October, when the parties appeared to be close to an agreement on custody and visitation, Valarie sabotaged those efforts. She lied about having hired an investigator to follow H.S.’s father and claimed he was selling marijuana.³ Hopes of a negotiated long-term visitation plan disappeared at this point. The State and the children’s guardian ad litem eventually joined in the fathers’ requests to terminate. The termination trial was held on November 3, 5, and 15, and December 8 and 21, 2010. The court terminated Valarie’s parental rights, finding that the children could not be returned to their mother.

Valarie argues that Tony is no longer a threat since he is in prison. The possibility Tony may be the father of the child conceived in March 2010 does not change the fact that she divorced Tony during the proceedings. Although Tony may no longer a factor in the analysis of the safe return of the children to

³ During a family team meeting called to work on expanded visitation, Valarie told service providers that she had hired a private investigator and insinuated Charles was selling drugs. The juvenile court found, “Not only was there no merit to allegations of drug dealing, [Valarie] was untruthful about hiring” a private investigator.

Valarie's custody, the record discloses other risks of adjudicatory harm. Valarie has had unauthorized persons present during her visits with her daughters, including members of Tony's family, and has exposed the children to the pit bull dogs in contravention to the court's order.

In cases where the district court terminated a parent's rights on more than one statutory ground, we will affirm if at least one ground has been proved by clear and convincing evidence. *In re R.R.K.*, 544 N.W.2d 274, 276 (Iowa Ct. App. 1995).

We agree that the fathers proved the statutory requirements for termination. Here, Iowa Code section 232.116(1)(h) has been proved by clear and convincing evidence: H.S., born May 2007, is under the age of three, has previously been adjudicated a CINA, has been out of Valarie's custody since October 2009, and cannot at present be returned to her mother. As for S.N., termination of Valarie's parental rights pursuant to section 232.116(1)(f) has been proved: S.N., born November 2003, is over the age of four, has previously been adjudicated a CINA, has been out of Valarie's custody for at least twelve of the last eighteen months (since October 2009), and cannot at present be returned to her mother.

The parental rights of the noncustodial parent may be terminated under chapter 232 even though legal custody of the child is placed with the other parent. *In re N.M.*, 491 N.W.2d 153, 156 (Iowa 1992). However, "[t]ermination is an outcome of last resort." *Id.* (quoting *In re S.J.*, 451 N.W.2d 827, 832 (Iowa 1990)). "In addition to the determination that the statutory grounds for termination have been met, we must determine that the termination would benefit

the children.” *In re B.L.A.*, 357 N.W.2d 20, 23 (Iowa 1984); see also *N.M.*, 491 N.W.2d at 156 (noting the court must determine whether termination is in the best interest of the child). We do not agree with the juvenile court’s conclusion that termination of their mother’s rights is in the best interests of the children.

This case is not like *N.M.*, where the non-custodial parent’s visitation was sporadic, the “visits had an obvious negative effect on the children,” and the children’s psychological evaluations and the on-going documentation of their negative reactions following these sporadic visitations with the mother show these children “deserve to be able to look forward to a positive future with their father without further disruptions by the mother.” In *In re B.L.A.*, 357 N.W.2d 20, 22-23 (Iowa 1984), and *Klobnock v. Abbott*, 303 N.W.2d 149, 152 (Iowa 1981), the court upheld the termination of a noncustodial parent’s rights where the custodial parent has remarried and provided a stable home environment and the noncustodial parent had “little interest,” *Klobnock*, 303 N.W.2d at 153, or “no close relationship” with the child. *B.L.A.*, 357 N.W.2d at 23.

Here, Valarie regularly visits her children and is paying child support as ordered by the court. Her parenting ability is not compromised by ongoing substance abuse, and her interaction with the children is appropriate.

The juvenile court noted there was a bond between Valarie and the children. The court wrote:

Sadly, the Court must conclude that the evidence supports no other finding than a severance of [Valarie’s] parental rights being in the children’s best interest. Her conduct has indicated that she has not, cannot, and will not place her children’s safety and well-being first. She is far more interested in her own agenda than what is in her children’s best interest. After more than fourteen months, after making some progress, her contact with the children must be

professionally supervised to ensure their safety, yet she now indicates she would seek primary physical custody in concurrent jurisdiction litigation. To continue the parent/child relationships would expose the children to ongoing strife, litigation, and contention that would undermine their safety, well-being and permanency.

The one event that changed the landscape between the September permanency order and the February termination was the breakdown of negotiations regarding custody in district court—a breakdown attributed to Valarie’s lie about hiring an investigator. The specter of ongoing litigation does not by itself support the conclusion that the best interest of the children lies in termination of the parental rights of their mother.

There is a concern that Valarie might allow Tony to re-enter her life upon his release from prison, particularly if he is the father of the child born to Valarie. However, that concern along with the likelihood of a contentious case in district court does not outweigh the compelling reasons not to terminate. In this case, those reasons include Valarie’s ongoing financial support and the placement of the children in the sole custody of their fathers, as the juvenile court found in the September 2010 permanency order. Although the fathers will face litigation in district court, that consequence does not compel termination of parental rights when considering the best interest of the children. These children have been in their respective father’s care for more than a year and are doing well in those placements. Both biological fathers have arranged for continuing contact

between the siblings. Both biological fathers indicate they intend to allow Valarie to be part of the children's lives.⁴

Termination of Valarie's rights leaves the responsibility for the children's financial needs with a single parent or the state. The children's needs would be better met by requiring the mother to pay child support than by terminating her parental rights. *Cf. In re T.O.*, 519 N.W.2d 105, 107 (Iowa Ct. App. 1994) (explaining that terminating parental rights completely severs duty of support and affirming dismissal of father's voluntary petition to terminate his own parental rights as not in child's best interests).

Giving "primary consideration to the child[ren]'s safety, to 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]," see Iowa Code § 232.116(2), we disagree with the juvenile court that termination of Valarie's parental rights is in the children's best interest.

In conclusion, because we agree with the juvenile court that the statutory grounds for termination of the mother's parental rights have been met, but disagree that termination of Valarie's parental rights best provides for the children's safety, long-term growth, and physical, mental, and emotional needs, we reverse and remand to the juvenile court.

REVERSED AND REMANDED.

⁴ The juvenile court's analysis included the fathers' commitment to include Valarie in the children's lives, even if her rights were terminated.