IN THE COURT OF APPEALS OF IOWA

No. 1-317 / 11-0340
Filed May 25, 2011

IN THE INTEREST OF M.G.,
Minor Child,

A.L., Mother,
Appellant.

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

A mother asks us to reverse the juvenile court order terminating her parental rights to her daughter. **REVERSED.**

Nancy L. Pietz, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Janet L. Hoffman, Assistant Attorney General, John P. Sarcone, County Attorney, and Andrea Vitzhum, Assistant County Attorney, for appellee.

Lynn Poschner of Borseth Law Office, Altoona, for father.

Charles Fuson of Youth Law Center, Des Moines, attorney and guardian ad litem for minor child.

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

TABOR, J.

A mother asks us to reverse the juvenile court order terminating her parental rights to her now four-year-old daughter, M.G. On appeal, the mother challenges the statutory grounds for termination. *See* Iowa Code § 232.116(1)(d), (h), (*l*) (2009). She also asserts termination is not in the child's best interest. Iowa Code § 232.116(2). She further argues termination was not necessary for two reasons: (1) the court placed M.G. in the custody of the girl's father and (2) severing the mother's rights would be detrimental to M.G. because of the strong mother-daughter bond. *See* Iowa Code *§* 232.116(3)(a), (c) (2009). Finally, the mother attacks the juvenile court's reliance on an incomplete child-protection assessment and unresolved criminal charges involving the mother.

We reject the mother's challenge to the statutory bases for the termination. The mother did not argue in juvenile court and does not claim on appeal that M.G. could be returned to her care at the present time or in the foreseeable future or that the circumstances that led to adjudication have been resolved. On the other hand, we agree with the mother that termination of only her parental rights was not in M.G.'s best interests in the long term and was not necessary given that the court placed M.G. in her father's custody. Accordingly, we reverse the termination.

I. Background and Proceedings

Amy and Chris are the unmarried parents of M.G., who was born in April 2007. The juvenile court adjudicated M.G. as a child in need of assistance (CINA) in October 2009 after a Department of Human Services (DHS)

investigation discovered that the parents were using methamphetamine and Amy allowed a drug dealer to stay in her home. The court removed M.G. from her parents' care and placed her with a paternal aunt.[1]

Following a dispositional hearing on December 1, 2009, the juvenile court noted that the parents were addressing their mental-health diagnoses and "gaining good insight regarding all the issues of these cases." Following a February 4, 2010 dispositional hearing, the court made the following finding of fact: "At a Family Team Meeting earlier today mother expressed candor and demonstrated insight not previously present. It is hoped that this will translate to expedited reunification."

On May 12, 2010, the juvenile court granted a request for concurrent jurisdiction so that Chris and Amy could pursue custodial orders in the district court. On July 8, 2010, the juvenile court continued M.G.'s placement with her aunt, noting that Chris recently tested positive for cocaine. But the court proposed that M.G. could be returned to her mother's care within three months if the mother met several expectations:

> maintain sobriety and healthy lifestyle, maintain nurturing relationship with [M.G.], demonstrate ability to meet [M.G.'s] emotional and basic needs, mother will obtain and maintain employment and independent housing, and parents will resolve mental health problems.

The next hearing was set for October 14, 2010, but was rescheduled because the State changed its recommendation and expressed its intent to file a

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[1] The court also removed Amy's older son, who has a different father. That child is not involved in this termination case.

petition to terminate parental rights. The court set a termination hearing for January 6, 2011.

The DHS held a family team meeting on October 25, 2010; notes from that meeting indicate that Amy was being "honest with the team" and continued to participate in therapy. The notes also said that both Chris and Amy "display good parenting skills" and are able to respond to M.G.'s needs. The workers expressed that the parents loved M.G. and "are bonded to her." Workers thought that Amy would benefit from having a specialist review her prescription medications. The notes also indicated that Chris relapsed on methamphetamine and was not forthcoming because he was afraid of losing M.G. The plan following the meeting was for Amy and Chris to spend five hours of semi-supervised time each week with M.G.

In a progress report dated November 22, 2010, care coordinator Joe Nixon wrote that Amy continued to maintain employment, recently moved to a new apartment that was suitable for her and her daughter, and "is starting to demonstrate that she can meet her daughter's basic needs." Nixon opined: "Amy has made progress forward." He recommended that Amy be "given more time to prove herself" and observed: "Delaying termination would seem to cause less emotional harm on [M.G.] than termination of the relationship between [M.G.] and her mother."

Nevertheless, on November 29, 2010, the State filed a petition for termination of parental rights. In early December, Amy learned that the DHS changed her visitations with M.G. back to being fully-supervised because of

allegations that Amy had been drinking alcohol. Amy told care coordinator Nixon on December 3 and December 15, 2010, that she was "very frustrated" by the allegations and that she had remained sober.

On December 18, 2010, the Altoona police stopped Amy for erratic driving and speeding and charged her with operating while intoxicated (OWI). She told the arresting officer that "she no longer wanted to live." Amy wrote in a letter to the juvenile court that she "really thought things were going great" and that she "was going to get [M.G.] back." But when Amy learned of the State's intent to terminate her parental rights she was "devastated" and made the "poor choice" to drink alcohol and then drive.

At the January 6, 2011 hearing, the State dismissed its termination petition against Chris and requested that M.G. be placed in his custody "so long as he continues to cooperate with the recommendations of DHS."

As for the termination of Amy's parental rights, the State did not present live witnesses at the hearing, instead offering several exhibits and asking the court to take judicial notice of the previous dispositional hearings. Also at the termination hearing, DHS worker Jessica O'Brien addressed the juvenile court concerning a not-yet-completed child protective report. The worker told the court that she believed based on a preliminary conversation with her colleague working on the investigation that there would "be a founded report" that Amy provided alcohol to her boyfriend's minor son. O'Brien said: "[T]he initial concern that brought us back to supervised visits was that there were concerns of Amy drinking again." Apparently, the State did not supplement the record with the

completed version of this child-abuse report, because the juvenile court mentioned the incomplete report in its termination decision.

Although contesting termination of her parental rights, Amy did not present any evidence at the hearing. Her attorney offered the following argument:

> [I]t's short-sighted to enter an order terminating her parental rights when there are other options available, such as a long-term transfer of custody, such as allowing the district court to have an order entered in the paternity action, which I believe there's still concurrent jurisdiction out there . . . .

Amy indicated to her counsel that she would be willing to sign an agreement to grant Chris sole legal and physical custody of M.G. Her counsel also pointed out that termination would foreclose any obligation for child support, despite the fact that Amy was employed. Amy's counsel further argued: "[I]n effect, the court will leave this child legally motherless for the next 15 years . . . . She's three." Counsel asserted that Amy "certainly has the ability to financially support this child over the course of that time frame."

The juvenile court rejected these arguments, finding no compelling reason to maintain the child's relationship with her mother, despite recognizing a strong bond between Amy and M.G. The court considered the fact that terminating Amy's parental rights would eliminate a source of financial support for the child, but gave it little weight considering Amy's unstable work history. The court noted:

> Unfortunately Amy failed to comply with clear expectations of the Court in its permanency order of July 8, 2010. Amy was given a great deal of time within which to demonstrate the expected behavioral changes that would have eliminated the need for [M.G.'s] removal, but rather than continuing the progress, her progress significantly deteriorated.

The juvenile court recognized that it was "an extreme remedy" to terminate the parental rights of one parent when the permanency plan is custody with the other parent. But the court decided that M.G.'s stability would be disrupted by Amy's current behaviors. The court summarized its findings like this: "Amy made terrible decisions at the eleventh hour that endangered [M.G.] and sabotaged imminent reunification." Amy appeals the termination decision.

II. Scope of Review

We exercise de novo review in termination appeals. *In re D.W.*, 791 N.W.2d 703, 706 (Iowa 2010). While we give weight to the juvenile court's findings of fact, we are not bound by them. *Id.* We give no weight to allegations that are not supported by the record. *See In re Nash*, 739 N.W.2d 71, 73 n.3 (Iowa 2007). Even when the State satisfies the statutory grounds for termination under section 232.116(1), our decision to terminate parental rights must reflect the child's best interests. *In re M.S.*, 519 N.W.2d 398, 400 (Iowa 1994). The best-interest determination focuses on the child's safety; her physical, mental, and emotional condition and needs; and the placement that best provides for her long-term nurturing and growth. Iowa Code § 232.116(2); *see In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010) (holding "there is no all-encompassing best-interest standard to override the express terms" of the statute).

III. Analysis

A. Statutory grounds for termination exist.

Amy argues generally that the State failed to prove the statutory grounds for termination, but does not point to any specific element that the evidence did

not satisfy. Even in the abbreviated briefing that is allowed in expedited parental termination appeals (Iowa Rs. App. P. 6.201(1)(*d*), 6.1401–Form 5), Amy's position is not sufficiently formulated to facilitate our review. *Cf. State v. Philpott*, 702 N.W.2d 500, 504 (Iowa 2005) ("Defendant's arguments on the evidentiary issues are too vague and indefinite to support the granting of relief based on the admission of improper evidence.").

Even if Amy had sufficiently preserved this issue for our review, the record contains clear and convincing evidence to satisfy all three statutory bases relied upon by the juvenile court. The court adjudicated M.G. as a CINA and the circumstances that led to that adjudication persisted despite Amy's receipt of services. Iowa Code § 232.116(1)(d). M.G. was three years of age at the time of the termination, had been adjudicated CINA, had been out of her mother's care for fifteen months, and—given her mother's recent arrest for operating while intoxicated—could not be returned to her mother's custody at the time of the hearing. Iowa Code § 232.116(1)(h). And the evidence of Amy's relapse supported the finding that she suffered from a severe, chronic substance abuse problem, presented a danger to herself and others, and given that prognosis the child could not be returned to her care within a reasonable period of time. Iowa Code § 232.116(1)(*l*). We agree with the juvenile court's conclusion that the evidence supported the statutory grounds for termination.

B. Termination of only her mother's parental rights is not in M.G.'s best interest and is not necessary given placement of the child with her father.

We part ways with the juvenile court on whether terminating Amy's parental rights was in M.G.'s best interest considering the factors in section 232.116(2) and whether this was an appropriate case to exercise discretion not to terminate given the circumstances listed in section 232.116(3)(a) and (c).

On the question of best interests, this is not a case like *In re P.L.*, 778 N.W.2d at 41, where the termination of Amy's parental rights would free up M.G. for adoption. The DHS entrusted M.G. to her father. That placement would not change regardless of whether the court terminated Amy's parental rights. M.G. would not be deprived of permanency if Amy's rights were kept intact.

M.G.'s physical, mental, and emotional needs are not well served by severing legal ties with her mother. Termination of Amy's rights leaves the responsibility for M.G.'s financial needs with a single parent or the state. The termination decision should have accorded more significance to the fact that Amy had a job and could help support M.G. financially during her childhood. The child'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); *but cf. In re Beck*, 793 N.W.2d 562, 567 (Mich. 2010) (holding termination of parental rights

does not remove the obligation of financial support as Michigan statutes distinguish between parental rights and parental obligation of support).

Monetary support notwithstanding, termination of the rights of one parent may be justified even when custody is entrusted to the other parent, if the non-custodial parent's conduct is likely to interfere with the effective care giving of the custodial parent. *See In Interest of N.M.*, 491 N.W.2d 153, 155 (Iowa 1992) ("We conceive of situations when a child in the custody of one parent would benefit from the termination of the other parent's rights."). But as the mother's petition on appeal points out, "There is no evidence before the Court to support a finding that this child's mother would disrupt [M.G.'s] placement with her father." The record contains no evidence of ongoing hostility between Amy and Chris. Amy's recent lapses in judgment, though troubling, have not directly involved M.G.

Just forty-five days before the termination hearing, the care coordinator assigned to M.G.'s case was touting Amy's progress. He opined that delaying termination to give Amy "more time to prove herself" would bring less emotional harm to M.G. than going forward with termination. Despite the care coordinator's optimistic comments, the county attorney opted to file a petition for termination of parental rights. There is no question that Amy fell apart when she learned of the State's plans to move forward with termination. Her poor decision-making obviously rendered her unable to resume custody of M.G. at any time in the foreseeable future. But the question is whether the mother's serious setback is cause for termination given the three-year-old child's placement with her father and the undisputed bond with her mother. *See* Iowa Code § 232.116(3). Given

all of the circumstances of this case, we do not believe that termination is mandated here.

Our case law reminds us that "termination is an outcome of last resort." *In re B.F.*, 526 N.W.2d 352, 356 (Iowa Ct. App. 1994) ("Legally ending a relationship with an ineffectual but loving and caring mother, without being reasonably assured of any hope of permanency with an adopted family, is of doubtful advantage to these children."). We do not dismiss the termination request lightly nor do we excuse the reckless behavior[2] exhibited by Amy at such a crucial point in her quest to reunite with M.G. But we do not think that it will benefit M.G. to terminate her mother's rights at this juncture.

The juvenile court acknowledged the loving bond between Amy and M.G., but noted that M.G. was lucky enough to have other "mother role model[s]" in her life. In our view, those relatives, no matter how committed to her well being, cannot replace M.G.'s tie with her biological mother. *See Santoksky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 1394–95, 71 L. Ed. 2d 599, 606 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.").

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[2] We share the mother's concern about the juvenile court's reliance on the incomplete child-protective assessment. We recognize that the rules of procedure are "liberally applied" in child-welfare cases so that "all probative evidence might be admitted." *In re J.R.H.*, 358 N.W.2d 311, 318 (Iowa 1984). But in this case, the DHS worker who shared the information with the court was not a sworn witness, was not subject to cross examination, and relayed a second-hand, incomplete report. We find that evidence unreliable and decline to consider it on appeal. By contrast, the State offered the mother's OWI arrest report as an uncontested exhibit and the mother admitted that conduct in her letter to the court. We find no error in consideration of Amy's arrest.

We find clear and convincing evidence in the record that termination of Amy's rights would be detrimental to M.G. due to the closeness of their relationship. *See* Iowa Code § 232.116(3)(c). We also believe that the court did not need to terminate Amy's rights given its decision to follow the DHS recommendation to place M.G. with Chris. *See* Iowa Code § 232.116(3)(a).

We conclude termination of Amy's parental rights was not in M.G.'s best interests and, considering the factors in section 232.116(3)(a) and (c), termination of the mother-daughter relationship is not necessary at this time.

REVERSED.