

IN THE COURT OF APPEALS OF IOWA

No. 1-371 / 11-0372
Filed June 29, 2011

**IN THE INTEREST OF S.K.,
Minor Child,**

STATE OF IOWA,
Appellant,

S.K., Minor Child,
Appellant.

Appeal from the Iowa District Court for Polk County, Joe E. Smith, Judge.

The State and the guardian ad litem for a child appeal a juvenile court order denying a petition to terminate the parental rights of the child's father, and appeal a permanency review order in a related child in need of assistance case.

REVERSED AND REMANDED.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, John P. Sarcone, County Attorney, and Christina M. Gonzalez, Assistant County Attorney, for appellant.

Kathryn Miller, Des Moines, attorney and guardian ad litem for appellant minor child.

Jared C. Harmon of Carr & Wright Law Firm, P.L.C., Des Moines, for appellee.

Considered by Eisenhauer, P.J., Potterfield, J., and Miller, S.J.*

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

MILLER, S.J.

Steven is the father, and Rebecca was the mother, of S.K., who was eighteen months of age at the time of a February 2011 hearing on a petition to terminate Steven's parental rights to S.K.¹ The State of Iowa and S.K.'s guardian ad litem each appeal from March 14, 2011 orders denying a petition to terminate Steven's parental rights to S.K. and ordering a related child in need of assistance (CINA) case closed. Upon our de novo review, we find the State proved a statutory ground for termination, termination is in S.K.'s best interest, and none of the statutory exceptions set out in Iowa Code section 232.116(3) (2011) should serve to preclude termination. We therefore reverse the orders of the juvenile court and remand for further proceedings.

I. BACKGROUND FACTS AND PRIOR PROCEEDINGS.

Rebecca was the mother of T.D., born in October 2006. Steven lived in Des Moines, Iowa, from August 2008 until sometime in the early months of 2009, during which time he and Rebecca had a relationship from November 2008 until late March 2009. During the latter part of their relationship Rebecca told Steven on several occasions that she was pregnant with his child. Sometime in early 2009 Steven left Des Moines. It appears he moved to North Carolina at that time.

S.K. was born in August 2009. In early September 2009 T.D. suffered scalding burns, allegedly caused by her step-father, Rebecca's husband, Shannon. The juvenile court ordered temporary removal of T.D. and S.K. and

¹ As discussed below, Rebecca's parental rights to S.K. had earlier been terminated.

placed them in the custody of the Iowa Department of Human Services (DHS) for placement commensurate with their needs. A petition was filed alleging each child to be a CINA. Notice of the CINA proceeding and a pending hearing was given to Steven, whose whereabouts was then unknown, by publication in late September and early October 2009.

In mid-October 2009 the two children were adjudicated CINA and were continued in DHS custody for placement in family foster care or the care of an appropriate relative. Following a November 2009 dispositional hearing, a February 2010 review hearing, and a June 2010 review hearing, S.K. was continued in DHS custody for family foster care placement.

In June 2010 the State filed a petition seeking termination of Rebecca's parental rights to T.D. and S.K. and Steven's parental rights to S.K. On June 23, 2010 Steven, who had by then been located, was served with notice of the termination proceeding. A termination hearing was scheduled for July 30, 2010. On July 26, 2010 Steven filed a motion noting that he had been notified of the termination proceeding on June 23, stating that paternity testing to determine whether he was S.K.'s father had taken place on July 19 and the results had not been received, and seeking continuance of the hearing.

A combined CINA permanency hearing and termination of parental rights hearing was held on July 30. In its resulting permanency order the juvenile court found, in part:

[S.K.] will be able to be placed in his father's custody within six (6) months if the following specific items are accomplished that will eliminate the need for [S.K.'s] continued placement in foster care. A paternity test shall be completed and that test shall be expedited

by the DHS. If that test shows that [Steven] is [S.K.'s] father a home study shall be completed of the father's home by the DHS's North Carolina equivalent or a private agency retained by the DHS for that purpose. If [Steven] is [S.K.'s] father his guardian ad litem shall immediately visit the father's home.

....
The Court determines that the primary permanency goal for [S.K.] is placement with Steven [] if the paternity test establishes him to be [S.K.'s] father. Should paternity be confirmed with [Steven] and a satisfactory report received on the home study and GAL visit[,] the state or GAL may approach the undersigned for an order transferring custody to [Steven] prior to the hearing date set below.

The court ordered that S.K. remain in DHS custody for family foster care placement and set a review hearing for September 20, 2010.

In a following order in the termination case the juvenile court terminated Rebecca's parental rights to T.D. and S.K., ordered the termination petition dismissed as to Steven and that his relationship with the court and the DHS would be governed by the permanency order in the CINA case, and ordered that S.K. continue in DHS custody for foster care placement pending results of the paternity testing.

By mid-August 2010 paternity testing had confirmed that Steven was S.K.'s father. A mid-September assessment of Steven's home in North Carolina for possible placement of S.K. in Steven's home had been completed by the North Carolina Department of Social Services (DSS). The DSS assessment noted that Steven was employed as a delivery driver/counter helper at what appears to be a pizza business or restaurant. Steven had reported that in a "good month" he had take-home pay of \$1,000, monthly expenses of \$882 (which included only \$150 for food), a \$240 per month car payment, and \$11,900 in debts on which he had been making no payments. Steven worked five days

per week, consisting of three evenings and two days. It thus appears likely that he worked less than full-time, or earned less than minimum wage, or perhaps both.

As noted in the DSS assessment, Steven was “in a relationship” with a seventeen-year-old Meredith, who was five months pregnant with Steven’s child. Meredith had not graduated from high school or acquired a G.E.D., and was unemployed other than doing some babysitting. Meredith was on thirty months probation for “possession/carrying a BB Gun/rifle on Educational Property” in 2008. Meredith had accidentally shot and killed her previous boyfriend in either the incident that led to the probation or in another separate incident, the home study assessment being somewhat unclear as to what incident or incidents led to the probation.

The DSS assessment reported that Meredith was living with her mother, but spending some nights with Steven, and was intending to move into Steven’s home when their baby was born. Meredith’s mother lived with a man who was subject to CPS (child protective services?) involvement alleging sexual abuse and neglect of a child. Steven and Meredith contemplated having Meredith’s mother and Meredith’s mother’s male friend provide caretaking for S.K. if S.K. were placed with Steven.

As reported by the North Carolina DSS, Steven lived in a two-bedroom “trailer” which, among other deficiencies, had an air vent in the floor that was caved in and covered with masking tape. Steven expressed the desire and intent to obtain a bigger and better home for himself, Meredith, their expected baby,

and S.K. if placed with him. The home assessment noted with some concern that seventeen-year-old Meredith had been drinking wine during her pregnancy and that she asserted that her doctor had told her it was okay to do so.

The North Carolina DSS home assessment recommended against placement of S.K. with Steven. It recommended that if such a placement nevertheless occurred, it occur only after Steven and Meredith participated in an intensive parenting program; that Steven participate in a psychological evaluation, as it appeared he may have cognitive delays; and that Meredith and Steven participate in counseling together.

The juvenile court held a CINA review hearing on September 20, 2010. The court noted that Steven's paternity had been established. An agreement had been reached that Steven would stay in Iowa for a week, meet S.K. for the first time, and attempt to begin establishing a relationship with him. With that in mind, the court provided that Steven would have daily visits with S.K. during the contemplated stay in Iowa. The court ordered, among other things, that Steven participate in parenting classes; Steven and Meredith undertake couples counseling and provide verification; Steven visit Iowa as often as possible, with the DHS to provide gas cards for all of his trips to Iowa; and that Steven have daily visits with S.K. when in Iowa. It was contemplated and agreed that Steven would come to Iowa two times per month for visitation. The court continued S.K. in the custody of the DHS, placed his guardianship in Steven, and scheduled a review hearing for January 18, 2011. That hearing was subsequently continued

and eventually held on February 28, together with a termination of parental rights hearing.

On January 31, 2011 the State filed a petition seeking termination of Steven's parental rights to S.K. The State sought termination pursuant to Iowa Code sections 232.116(1)(d), (e) and (h). Following a hearing the juvenile court found that the State had not proved the grounds for termination under either section 232.116(1)(e) or (h), and that it had not proved that termination was in S.K.'s best interest. The court did not address section 232.116(1)(d). It ordered that S.K. be immediately placed in Steven's custody and that the termination petition be dismissed. In the CINA case the court ordered that the State present an order closing the case when S.K. had been transferred to Steven.

The State and S.K.'s guardian ad litem appealed, and seek reversal of the juvenile court's orders. Our supreme court ordered the two juvenile court orders stayed pending resolution of the appeal, and transferred the appeal to this court.

II. SCOPE AND STANDARDS OF REVIEW.

Our review of a termination of parental rights proceeding is *de novo*, *In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010), as is our review of CINA cases, *In re D.D.*, 653 N.W.2d 359, 361 (Iowa 2002). We are not bound by the juvenile court's findings of fact, but we give them weight, especially when considering the credibility of witnesses. Iowa R. App. P. 6.904(3)(g); *In re C.B.*, 611 N.W.2d 489, 492 (Iowa 2000). Grounds for termination of parental rights must be proved by clear and convincing evidence. *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006). "Clear and convincing evidence' means there are no serious or substantial

doubts as to the correctness or conclusions of law drawn from the evidence.” *In re C.B.*, 611 N.W.2d at 492.

III. STATUTORY GROUNDS FOR TERMINATION.

Steven lived in Des Moines, Iowa, for six months or more in late 2008 and early 2009. Before he left Des Moines, Rebecca, who was about three months pregnant with S.K., told Steven on several occasions that she was pregnant with his child. Steven took no steps to keep in touch with Rebecca or to become aware of whether and when his child, S.K., was born. Steven was fully aware that Rebecca might have given birth to his child, as he told Meredith in about October 2009 that he might have a baby with Rebecca.

At the time of the September 20, 2010 review hearing, Steven agreed to stay in Iowa for a week and have daily visits with S.K. in order to get to know him and attempt to develop some relationship with him. Steven visited S.K. once briefly, the next morning, and then left Iowa.

At the time of the September 20 hearing it was suggested that it would be difficult for Steven to develop a relationship with S.K. and be in a position to assume custody of him unless he had frequent and continuing contact with him, and that the necessary contact might be very difficult unless Steven moved back to Des Moines, where he had previously lived. Steven was reluctant to move back, stating as reasons that he was employed, he intended to find better employment where he was located, and he intended to secure a bigger and better home there for himself, Meredith, their expected child, and S.K.

As of September 2010 it was planned and agreed that as long as Steven continued to reside elsewhere he would come to Iowa on two occasions per month to have visitation with S.K. on two or more days each time. Steven had a brother in Des Moines with whom he could stay during such visits. The DHS was willing and able to provide gas cards for Steven to use as often as he was willing to come to Des Moines. Steven nevertheless came only once per month, some of those visits occurring only in conjunction with court hearings.

Steven was advised, and the evidence clearly shows, that S.K. would suffer significant trauma if he were removed from his foster family, the only family and home he has ever known, and placed with Steven before a substantial relationship and some attachment had developed between S.K. and Steven. Steven has nevertheless at times harbored a belief that, because he is S.K.'s biological father, S.K. would instinctively recognize him as his father, have a natural relationship with him, and be comfortable in his custody. Perhaps this belief explains in part Steven's lack of a realistic effort to have contact with S.K. and develop a relationship with him.

The record convinces us that Steven has not made definite or safe plans for the care of S.K. in North Carolina. A few of several examples will suffice.

Steven indicated that if S.K. were to be with him, Meredith would provide S.K.'s care when Steven could not do so. The North Carolina DSS felt Meredith would not be appropriate to provide such care, because of a substantial juvenile record and her current weapons-related probation. Steven indicated Meredith's mother and her male friend would instead then provide care for S.K. When that

idea appeared ill-advised because of the pending investigation of the male friend for sexual abuse of a child, Steven identified his mother as a probable caretaker for S.K.

At the termination hearing Steven testified that Meredith's mother's male friend had separated from Meredith's mother in July 2010. When confronted with his earlier statements that they were still together in September 2010, he then asserted they must have separated in September or later. It appears questionable whether they have in fact separated, and the evidence indicates that Steven may still consider Meredith's mother as a possible caretaker for S.K.

Contrary to the reasons that Steven stated in September 2010 for not moving to Iowa, as of the termination hearing he lived in the same two-bedroom trailer, had not found any different home, and worked at the same job but now four days per week rather than the five days he worked in September. His principal expressed reasons for declining to return to Des Moines, and his resulting failure to establish any meaningful relationship with S.K., thus ring rather hollow.

Iowa Code section 232.116(1)(e) provides that the court may terminate parental rights if the court finds that all of the following have occurred:

- (1) The child has been adjudicated a child in need of assistance pursuant to section 232.96.
- (2) The child has been removed from the physical custody of the child's parents for a period of at least six consecutive months.
- (3) There is clear and convincing evidence that the parents have not maintained significant and meaningful contact with the child during the previous six consecutive months and have made no reasonable efforts to resume care of the child despite being given the opportunity to do so. For the purposes of this subparagraph "*significant and meaningful contact*" includes but is not limited to the

affirmative assumption by the parents of the duties encompassed by the role of being a parent. This affirmative duty, in addition to financial obligations, requires continued interest in the child, a genuine effort to complete the responsibilities prescribed in the case permanency plan, a genuine effort to maintain communications with the child, and requires that the parents establish and maintain a place of importance in the child's life.

The first two of these three elements were clearly proved, do not appear to be subject to reasonable dispute, and we thus focus on the third.

In determining whether a parent has maintained significant and meaningful contact with a child and has made reasonable efforts to resume care of the child, we must of course look at the contacts the parent has had with the child and the efforts the parent has made. We are convinced that we must also view these contacts and efforts in the context of the child's needs. We say this because what may be significant and meaningful contact and reasonable efforts where a strong and healthy pre-existing relationship between a parent and child exists, the same contact and efforts may be woefully inadequate where the parent and child have had no prior contact with each other and come before the court as total strangers.

Steven knew he might be the father of a child born to Rebecca, but made no effort to determine whether such a child existed or to have a relationship with the child until he was notified the State sought to terminate his parental rights. Steven did not meet S.K. until S.K. was thirteen months of age. After committing to visit S.K. daily for a week in September 2010, Steven saw S.K. briefly the next day and then left Iowa. After agreeing to visit S.K. on two occasions per month after September 2010, Steven visited him on only one occasion per month over

the next five months, and exercised some of those visitations only in conjunction with court hearings.

Steven no doubt has some interest in S.K. and has made some efforts to complete some of the responsibilities prescribed in the case plan. As examples, he has taken a parenting class, and he has undertaken couples counseling, although only beginning in late November 2010, more than two months after the couples counseling was ordered. There is, however, no evidence that he has ever provided any financial support for S.K., attempted to do so, or offered to do so. Further, in view of the lack of any pre-existing relationship between Steven and S.K., Steven has not made reasonable efforts to maintain contact and communication since September 2010, and has not established a place of importance in S.K.'s life.

We respectfully disagree with the juvenile court's contrary conclusion, and conclude the State proved by clear and convincing evidence the grounds for termination pursuant to section 232.116(1)(e). We need not and do not address or decide whether the State also proved one or both of the other grounds relied upon by the State, sections 232.116(1)(d) and (h). See, e.g., *In re S.R.*, 600 N.W.2d 63, 64 (Iowa Ct. App. 1999) (holding that when the juvenile court terminates parental rights on more than one statutory ground, we need only find grounds to terminate under one of the sections relied on by the juvenile court in order to affirm).

IV. BEST INTEREST.

We apply the best-interest framework of Iowa Code section 232.116(2) to determine whether a proven statutory ground for termination should result in termination of a parent's parental rights. *In re P.L.*, 778 N.W.2d at 39. We give primary consideration to the child's safety, the best placement for furthering the child's long-term nurturing and growth, and to the child's physical, mental, and emotional condition and needs. Iowa Code § 232.116(2).

S.K. may now recognize Steven when he sees him, but Steven's infrequent and limited contacts with S.K. have been insufficient for S.K. to develop a relationship with or any attachment to Steven. No bond exists between the two.

S.K. was placed with a foster family when about one month of age, shortly after his removal Rebecca in September 2009. He has lived with that foster family since then, the last seventeen months of his eighteen-month life. It is the only family and home he has ever known. He is closely bonded to that family, and is thriving in its care. S.K. has become integrated into his foster family to the extent his familial identity is with that family. S.K.'s placement is a pre-adoptive placement, and his foster family is able and willing to adopt him and permanently integrate him into the family.

Clear and convincing evidence shows that if S.K. were placed with Steven under the existing circumstances S.K. would suffer significant trauma, and the placement would require ongoing supervision and services, including ongoing therapy provided by a professional. Because the North Carolina DSS has

strongly recommended against S.K.'s placement with Steven, it would not provide the necessary supervision and services.

We conclude that termination of Steven's parental rights is in S.K.'s best interest.

V. STATUTORY EXCEPTIONS.

We must also consider whether any of the statutory exceptions set forth in Iowa Code section 232.116(3) should serve to preclude an otherwise appropriate termination of parental rights. *In re P.L.* 778 N.W.2d at 39. We have carefully reviewed those exceptions and find that none apply in this termination case.

VI. CONCLUSION AND DISPOSITION.

We conclude the juvenile court should have terminated Steven's parental rights to S.K. We therefore reverse the juvenile court's orders in the CINA and termination cases and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.