IN THE COURT OF APPEALS OF IOWA

No. 2-187 / 12-0135
Filed March 28, 2012

IN THE INTEREST OF E.C.-N. and D.N.,
Minor Children,

E.N., Mother,
Appellant.

Appeal from the Iowa District Court for Franklin County, Peter B. Newell, District Associate Judge.

A mother challenges the termination of her parental rights to her now four-year-old daughter and two-year-old son. **REVERSED AND REMANDED.**

Jennifer Meyer of Jennifer Meyer Law, P.C., Marshalltown, for appellant.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Dan Wiechmann, County Attorney, and Brent J. Symens, Assistant County Attorney, for appellee.

Michael Cross, Hampton, for father.

Megan R. Rosenberg, Hampton, attorney and guardian ad litem for minor children.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

TABOR, J.

A mother challenges the termination of her parental rights to her now four-year-old daughter and two-year-old son.[1] She contends on appeal that because the Iowa Department of Human Services (DHS) did not offer her increased visitation with the children, the State did not meet the "reasonable efforts" requirement under Iowa Code section 232.102(7) (2011). The children's guardian ad litem joins the mother in her appeal.

Our de novo review of the record does not reveal reasonable efforts by the DHS to follow the district court's recommendation in its July 2011 order that the mother's visitation be increased. Accordingly, we reverse and remand for the mother to be afforded an additional six months to work toward reunification with her children. *See* Iowa Code § 232.104(2)(b). During that time, the DHS should transition the mother into semi-supervised or unsupervised visits or, if less restrictive visits are not consistent with the best interests of the children, to provide specific information to the district court detailing why the children would not be safe during such visits.

I. Background Facts and Proceedings.

Lisa is a young mother. She started living on her own when she was just fifteen because her own mother was abusive. Lisa was seventeen when she gave birth to her daughter E.C.-N. in November 2007. Her son, D.N., was born a little more than two years later, in February 2010.

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[1] The district court also terminated the parental rights of the children's fathers, but the fathers have not appealed.

During the summer of 2010, E.C.-N.—then two-and-one-half years old—was twice found unsupervised wandering outside her family's apartment on a highway that runs through Hampton. The toddler was not hurt, but the DHS launched an investigation and started providing services. On August 27, 2010, the State removed the children from their mother's care.[2]

The court adjudicated E.C.-N. and D.N. as children in need of assistance (CINA) on September 14, 2010. The evidence showed Lisa lived a very chaotic lifestyle with the children, moving frequently and exposing the children to a string of casual acquaintances and paramours. The court directed Lisa to undergo a mental health evaluation.

Throughout the life of the CINA case, the DHS workers were called upon to provide Lisa with very basic parenting information. By the April 27, 2011 review hearing, the district court found Lisa's interactions with her children had improved, but the DHS remained concerned about the instability of her housing and employment situation. By the July 27, 2011 permanency hearing, Lisa had secured her own two-bedroom apartment and had obtained nearly full-time employment at a McDonald's restaurant. She also was regularly attending mental health counseling, though she missed appointments when she was unable to find transportation or get time off work. In its July 27, 2011 order, the court "encouraged" the DHS to allow semi-supervised visits between the mother and her children.

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[2] At this time, Lisa was living with Mario, who was E.C.-N.'s father. Mario left the United States to care for his ailing mother in Mexico in December 2010. He did not provide support for his daughter and did not appear for any of the juvenile court hearings. The identity of D.N.'s father was not determined.

The State filed its termination petition on June 28, 2011. The court heard evidence concerning termination on October 5 and December 14, 2011. The family's caseworker testified Lisa's supervised visits with her children "go well" and the mother meets their physical needs. The worker added that Lisa states she "likes to teach her children to be independent," so in the worker's view, "she doesn't engage them a lot." The social workers also testified to ongoing concerns about Lisa's ability to provide proper supervision for her children and to live within a budget. The workers said Lisa was hostile to their suggestions concerning her relationships with men and they believed she depended too much on other individuals to meet her needs. The children's foster mother told the court about the progress the children had made while in her custody and her willingness to adopt them.

Lisa testified she believed her children could be returned to her care and she would have support from her sister and her friend Diana. She admitted being somewhat defiant with the DHS workers. She told the court her employment had been steady for six or seven months and she wanted to look for better job opportunities, but did not want to appear unstable in advance of the termination hearing. She also testified her visits with the children had been six hours per week (two-hour sessions, three times per week) for roughly nine months, without the DHS giving her a chance to increase to less-restrictive supervision.

The children's guardian ad litem spoke against termination, touting Lisa's strides in employment, housing, and mental health treatment. The guardian ad

litem recommended Lisa be given additional time to see if she could safely parent the children and expressed the following opinion:

> I don't know that nine months with the same visitation is a reasonable effort to get the kids reunited with her. I think there is a little more the State could have done to get the kids back with her, and I do think she's done a lot and she's done what they have asked her. She's done more—in my experience, she's done more as a mom with her kids removed than a lot of parents do, and I don't think she should be punished for that.

On January 10, 2012, the court issued its order terminating parental rights based on Iowa Code section 232.116(1)(h). The mother appeals, joined by the guardian ad litem.

II. Scope and Standard of Review.

We review termination decisions de novo. *In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010). We give weight to the district court's factual findings, but are not bound by them. *In re D.S.*, 806 N.W.2d 458, 465 (Iowa Ct. App. 2011). We will uphold a termination order if the record contains clear and convincing evidence of grounds for termination under Iowa Code section 232.116(1). *In re D.W.*, 791 N.W.2d 703, 706 (Iowa 2010). Evidence is "clear and convincing" when there are no "serious or substantial doubts as to the correctness or conclusions of law drawn from the evidence." *Id.*

III. Analysis.

The DHS must "make every reasonable effort" to return children to their home as quickly as possible consistent with their best interests. Iowa Code § 232.102(7); *In re C.B.*, 611 N.W.2d 489. 493 (Iowa 2000). The reasonable-efforts concept includes visitation designed to facilitate reunification while

providing adequate protection for the children. *C.B.*, 611 N.W.2d at 493. "Visitation between a parent and child is an important ingredient to the goal of reunification." *In re M.B.*, 553 N.W.2d 343, 345 (Iowa Ct. App.1996). But the best interests of the child controls the nature and extent of visitation. *Id*.

Reasonable efforts are not a "strict substantive requirement" that must be met before terminating parental rights. *C.B.*, 611 N.W.2d at 493. Showing the DHS has made reasonable efforts to reunite the family is one component of the State's overall proof the children cannot be safely returned to the care of a parent. *Id*.

The State initially contends Lisa did not preserve error on her reasonable-efforts claim. The State acknowledges the July 27, 2011 permanency order "encouraged" DHS to allow semi-supervised visitation, but notes the mother did not appeal that order. We do not believe the mother was obliged to appeal an order including a favorable directive in order to preserve her claim concerning reasonable efforts. *See Johnston Equip. Corp. of Iowa v. Indus. Indem.*, 489 N.W.2d 13, 16 (Iowa 1992) (reasoning "a party need not, in fact cannot, appeal from a favorable ruling."). We find the mother preserved error by seeking less-restrictive visitation before the termination hearing.

In its July 27, 2011 order, the district court noted the mother's counsel "strongly urged the Court to direct the Department of Human Services to allow his client to have semi-supervised visits with these children so she could prove that she was able to appropriately parent these children." The attorney volunteered to attend the visitation to insure the children's safety "if that would

satisfy" the DHS. The order also summarized the DHS report that Lisa missed several visits in May and it required "as a minimum that the mother attend four visits in a row before they consider semi-supervised visits." The court concluded that after the parties made these records, it "encouraged" the DHS to allow semi-supervised visitations.

Despite this encouragement, the DHS did not make any effort to move the family away from fully-supervised visitation. The DHS workers did not claim Lisa missed her regularly-scheduled visits. Instead, they expressed a generalized concern the children would be at risk without DHS supervision. Our court has required more particularized reasons for restrictions on visitation. *See In re S.W.*, 469 N.W.2d 278, 281 (Iowa Ct. App. 1991) (reversing order to decrease parental visitation with child in foster care because reduction was based on "vague interpretations" of the child's behavior).

Lisa's caseworker, Joyce Lindloff, engaged in the following exchange with the assistant county attorney at the termination hearing:

> Q. Was there ever any discussions or thought given to having unsupervised visitations? A. No. Well, we've talked about it, but didn't feel it was in the best interests of the children.
> Q. And why did you make that decision and why do you feel that way? A. Well, I think we felt that way because there was risk for injury to the children, lack of supervision.

It is true lack of supervision of E.C.-N. as a toddler sparked the involvement of the DHS in the first place. But Lisa testified she now understands it is a mistake to entrust her children to undependable caregivers.

Caseworker Ann Lewerke testified she had safety concerns because the children had fallen during visits and the mother had not been standing closely

enough to assist them. The worker responded to cross examination: D.N. "is a very clumsy little boy and does fall a lot, so, that is an issue." But our review of the record shows the same concerns for D.N.'s safety were present in the foster home, where D.N. sustained a black eye from an accidental fall. The foster mother testified: "He is just a very rough and tumble little guy, and just, you know, falls sometimes." The caseworker's worry about playground falls does not warrant the department's lack of reasonable efforts to expand the mother's visitation.

Perhaps a more credible concern was the fact Lisa allowed casual acquaintances access to her apartment. Lewerke testified that a few weeks before the December termination hearing, Lisa and the children met at the apartment for a supervised visit and Lisa was surprised to find visitors there. We share the district court's observation that Lisa "needs to have an active role in screening her children from potentially dangerous individuals." But the record lacks clear and convincing evidence that Lisa has exposed her children to dangerous individuals during the nine months of supervised visitation. Lisa was emphatic she did not permit her friend Wilbert to use or possess controlled substances in her apartment, but testified that outside of her home, "his problems" are "his problems." She also testified she did not know if he was using drugs at all. The district court interpreted Lisa's attitude as "indifferent" to her friend's involvement with drugs. Even if Lisa was not vigilant enough about checking Wilbert's background, the State did not offer persuasive proof her

association with him posed a risk to her children. The State offered no evidence to substantiate this individual was involved with illegal substances.

We are persuaded by the guardian ad litem's position that Lisa complied with the benchmarks set by the DHS—maintaining steady employment, obtaining suitable housing, attending counseling and regular visitation—yet the DHS did not make reasonable efforts to reunite the family by moving toward unsupervised visitation. The guardian ad litem was a neutral observer whose viewpoint was deserving of serious consideration. *See In re S.V.*, 395 N.W.2d 666, 672 (Iowa Ct. App. 1986) (crediting expertise of guardian ad litem as netural witness who has experience and training in CINA cases).

The situation here is different from that in *In re M.B.*, 553 N.W.2d 343 (Iowa Ct. App 1996), where our court found the DHS made reasonable efforts at reunification despite denying the mother's request for expanded visitation. In *M.B.*, continued restrictions on visitation were a "reflection on [the mother's] poor overall progress in resuming custody of her children." *M.B*., 553 N.W.2d at 345. Here, less than three months before the commencement of the termination hearing, the court saw enough progress from Lisa to "encourage" the DHS to offer her more liberal visitation. Nothing in the record shows the DHS took that recommendation seriously. We realize the extent of the visitation is guided by the children's best interests, but the testimony from the social workers offered by the State at the termination hearing was too vague to support a finding of reasonable efforts.

We reverse the termination ruling and remand for the district court to enter an order continuing foster care placement for an additional six months under Iowa Code sections 232.102 and 232.104(2)(b). That order should set expectations for the DHS to make reasonable efforts to provide Lisa with semi-supervised or unsupervised visitation with her children during the six-month extension. If the children cannot be adequately protected during less restrictive visits, the DHS must provide information to the district court describing the specific safety risks posed by allowing the mother unsupervised time with her children. *See* Iowa Code § 232.102(10) (emphasizing that the children's "health and safety shall be the paramount concern in making reasonable efforts."). We do not retain jurisdiction over the case.

REVERSED AND REMANDED.