

IN THE COURT OF APPEALS OF IOWA

No. 2-245 / 12-0269
Filed April 11, 2012

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

STATE OF IOWA,
Appellant,

K.S., Minor Child,
Appellant.

Appeal from the Iowa District Court for Clinton County, Phil J. Tabor,
District Associate Judge.

The attorney/guardian ad litem for a child and the State appeal from the
juvenile court order dismissing the State's petition to terminate the parental rights
of the child's mother. **AFFIRMED.**

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant
Attorney General, Mike Wolf, County Attorney, and Cheryl J. Newport, Assistant
County Attorney, for appellant State.

Stephen D. Haufe of Frey, Haufe & Current, P.L.C., Clinton, attorney and
guardian ad litem for minor child.

Matthew L. Noel of Blair & Fitzsimmons, P.C., Dubuque, for appellee
mother.

Marsha J. Arnold, Davenport, for appellee father.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ. Tabor, J., takes
no part.

POTTERFIELD, J.

The State filed a petition to terminate a mother's parental rights to her child. The juvenile court denied the petition, and the guardian ad litem/attorney for the child and the State both appealed. We affirm the juvenile court's order declining to terminate the mother's parental rights.

I. Background Facts and Proceedings

The child at issue was temporarily removed from the mother's care upon discharge from the hospital only two days after the child's birth in May 2011. At the time of birth, the child had two older half-siblings who were in the custody of the Iowa Department of Human Services (DHS) after having been removed from the mother's care. In March 2011, the mother had successfully completed a residential substance abuse treatment program and moved into an apartment. Approximately one month later, she was discharged from the aftercare program for failure to attend her scheduled sessions. DHS has been involved with the family since 2009 and had ongoing involvement primarily because of the mother's use of illegal drugs and history of relationships involving domestic abuse.

At a removal hearing on June 6, 2011, the juvenile court found the child could be returned to the mother because the mother had completed a clean drug test and had agreed to abide by a no-contact order with the child's father, against whom there was a recent finding of physical abuse of the mother's older two children.¹

¹ The father's parental rights were terminated and are not at issue on appeal.

On June 15, 2011, a service provider went to the mother's apartment to talk with the mother about posting on the father's Facebook wall in spite of the no-contact order. The worker's written statement indicates that when she arrived at the mother's apartment, the father was in the kitchen and the mother was in her bedroom with the child packing a basket. The mother's written statement says the father entered her house and would not leave, so she was packing clothes to leave with the child. The mother admitted to communicating with the father via Facebook but stated she did not realize this was a violation of the no-contact order.

At a subsequent visit to the mother's house on June 16, 2011, police found drug paraphernalia and noted the odor of marijuana in the mother's apartment. The mother claimed the paraphernalia belonged to a man she allowed to stay at her place from time to time. DHS was not aware of this man's presence in the mother's life. This individual later claimed ownership of the drug paraphernalia. The mother and child were tested for drugs, and both were clean.

Following these incidents, the child was removed from the mother's care June 17, 2011, and has not returned to her care since.² In its removal order filed August 1, 2011, the court wrote, "The Court specifically notes the child was returned to the mother's care with the specific understanding there would be a no-contact order with [the child's father] and that there would be no substances in her life. Both of these conditions were violated by the mother."

² The child was placed in foster care. No one disputes that the child is doing well in the foster home.

The child was adjudicated to be in need of assistance on August 1, 2011. On August 10, 2011, the court terminated the mother's rights to her two older children who are not at issue in this case. The termination was based largely on the mother's history of choosing paramours who were substance abusers and physically abused both her and her children. The court found the children could not be reunited with their mother "due to the mother's inability to protect the children from her abusive paramours." On August 30, 2011, the mother told a case provider she would not resume her relationship with the father of K.S. once the no-contact order was lifted because she felt it was his fault her parental rights to the two older children had been terminated.

On October 7, 2011, the mother called the police to report a domestic assault. The police arrived and found the child's father hiding in a closet in the mother's apartment. He was arrested for domestic assault. The police report states the mother reported her live-in boyfriend, the child's father, had physically abused her. The police report noted a valid no-contact order was in effect between the mother and father. The report further details that the mother "stated she was going to her mother's place for the night due to [the father] possibly coming back to the residence since he has a key." The mother signed a police report indicating she had been physically abused by the child's father, her "live in boyfriend."

At the trial for termination of the mother's parental rights to the child at issue in this case, the mother and the father both testified they were not living together when the incident occurred on October 7, 2011. The mother testified she never told the officer the child's father lived with her and stated the officer

lied. She testified she had not lived with the father since June 2011. In November 2011, the father told a service provider he had been living with the mother since she moved into her apartment (in March 2011), had a key to the place, and also had been at her place the day the drug paraphernalia was found. The father later denied this, saying the service provider had misunderstood him. The mother testified against the father in the criminal trial that resulted from the domestic incident. In that trial, the mother testified that at the time of the domestic assault incident, she was not living with the father, although he did come over at times.

In a permanency order filed December 13, 2011, the juvenile court found, "Since our last hearing [September 2011], there has been another incident of domestic violence between the mother and the father, and there has been continued violation of the no contact order. The child cannot be returned safely to either parent at this time." Based on the parents' lack of progress to rectify the circumstances that led to the adjudication of the child as a child in need of assistance, the court found a hearing should be scheduled to determine whether parental rights should be terminated. On January 9, 2012, the State filed a petition for termination of parental rights.

Throughout the pendency of these proceedings, the mother's visits with the child were supervised. The mother testified at the termination trial that she had two supervised visits per week with the child for two hours each. The mother consistently attended the visits and, with the exception of a few minor issues, was appropriate and loving with her child. The mother was consistently

employed and had appropriate housing for the child. The mother also regularly attended the child's doctor appointments.

The mother asked for increased visits with her child on more than one occasion. The DHS case manager testified the mother did not receive increased parenting time because of her behavior during visits, noting a few minor incidents and also the mother's attitude that she would do what she wanted with her child and did not have to listen to service providers' parenting suggestions. Several care providers noted the mother was not receptive to parenting suggestions and would do things in direct opposition to their suggestions.

At the termination trial on January 30, 2012, the mother testified she was involved in an intimate relationship with a man she met through Facebook in December 2011. She knew very little about the man, including whether he had a criminal history, and testified, "It is not a relationship . . . it's just sex." The mother also testified she had been involved in domestic violence counseling for approximately two months. She testified she met with her counselor once per week, but she did not tell her counselor about her new relationship.

The mother admitted to using synthetic marijuana, K2, in March 2011, but testified she had otherwise not used drugs for fifteen months. The DHS caseworker assigned to the case agreed the mother had not had a positive drug screen since March 2011.

The child's foster mother testified at the termination trial that she saw the mother with the child's father at Wal-Mart on December 24, 2011. The mother and father both denied this. They each testified the last time they had talked to one another was the October 7, 2011 incident.

The DHS case manager filed an affidavit recommending termination of the mother's parental rights. At the conclusion of the trial, the guardian ad litem acknowledged the mother had made improvements but also noted problems persisted. The guardian ad litem therefore recommended termination, stating the child had waited long enough.

On January 31, 2012, the juvenile court entered an order terminating the father's parental rights but dismissing the State's petition as to the mother. The court found,

[T]he mother's situation in this child's case is different than the case where her rights to her previous children were terminated. The mother has resolved her issues of substance abuse. The mother has resolved her relationship issues and is currently receiving counseling for domestic violence and for relationship issues. The mother is employed. The mother has an appropriate home, and while the mother is not always fully cooperative with the providers, there is no indication that the mother has ever put the child at risk.

The court concluded the State had not proved by clear and convincing evidence grounds for termination of the mother's parental rights. The attorney/guardian ad litem for the child and the State appeal, claiming that the evidence proved a statutory ground for termination and that termination of the mother's rights was in the child's best interests.

II. Analysis

The State's petition for termination of parental rights alleged grounds for termination existed pursuant to Iowa Code section 232.116(1)(d), (g), (h), and (i) (2011). Upon our de novo review, we find the juvenile court did not err in finding the State did not prove by clear and convincing evidence any of the statutory grounds for termination. See *In re M.S.*, 519 N.W.2d 398, 399 (Iowa 1994)

(stating our standard of review is de novo). In reaching this conclusion, we give weight to the findings of the juvenile court, which had the opportunity to observe the witnesses and their demeanor. See *In re Marriage of Forbes*, 570 N.W.2d 757, 759 (Iowa 1997).

The mother has been making constant improvements since the birth of the child, and we agree with the juvenile court that these improvements render the mother's situation at the time of the termination trial in this case different than it was when her rights to her two older children were terminated. The record reflects that the mother has not used any illegal substances since her child's birth. Further, the mother was attending domestic violence counseling; she also reported an incident of domestic violence and testified against the child's father in his criminal trial, evidencing a decreased dependency on the volatile relationship.

The record is clear that the mother behaves appropriately during visits with the child. Though several caseworkers reported the mother was difficult to work with and was not receptive to advice, this does not justify terminating the mother's parental rights and should not prevent the mother from receiving additional parenting time with her child. The mother consistently attended visits with the child and was able to meet the child's needs and keep the child safe. We find this long-term ability to provide proper care for the child is more telling than one isolated incident pointed to by the State and guardian ad litem in which the mother allowed the child a sip of soda contrary to suggestions by a provider. In addition, the mother has maintained employment and a safe and appropriate home for the child.

Based on our findings above, we believe the mother showed an ability and willingness to respond to services provided and, as a result, the circumstances that led to the adjudication of the child did not continue to exist at the time of the termination trial. See Iowa Code § 232.116(1)(d), (g), (i) (providing grounds for termination where the circumstances that led to the adjudication continue to exist after the receipt of services; where the parent lacks the ability or willingness to respond to services; or where there is clear and convincing evidence the offer of services would not correct conditions that previously led to abuse).

We also conclude the State did not prove that the child cannot be returned to the mother's custody at the present time. See Iowa Code § 232.116(1)(h) (providing grounds for termination where a child cannot be returned to the parent at the present time). A care provider stated the child could not be returned to the mother at the present time because the mother was not receptive to redirection during visits, was not truthful with service providers, and had violated the no-contact order. When asked what was lacking in the mother's parenting skills, another care provider responded, "I think it's basically just the attitude . . . [that] it's my daughter, my child; I can do what I want to." While we agree with care providers that this attitude will make the mother's progress more difficult, there was no indication the mother's parenting skills were lacking to the point where the child would be unsafe in her care. Further, the mother had shown growing insight into her relationship with the child's abusive father, was involved in counseling to address the domestic violence in her life, and participated actively in the prosecution of the father. Concerns about an alleged violation of the no-contact order were not given great weight by the juvenile court, and we do not

find, on our de novo review, that the mother's somewhat defiant attitude toward authority outweighs her stability, sobriety, and ability to care for her child.

It appears most of the care providers' concerns stem from facts relevant to the mother's prior termination of her older two children. However, as discussed above, we believe these circumstances had changed significantly by the time of the termination trial in this case. Because of the mother's consistent ability to properly care for the child and her improvements related to her drug abuse and involvement in violent relationships, we find the State has not proved grounds to terminate under any of the grounds asserted in its petition. Accordingly, we find the district court did not err in dismissing the petition as it related to the mother while continuing the underlying child-in-need-of-assistance case.

AFFIRMED.

Doyle, J., concurs; Vogel, P.J., specially concurs.

VOGEL, P.J. (concurring specially)

I concur with the majority that the State failed to prove the necessary elements to terminate the mother's parental rights. However, I write separately to echo the concern of the guardian ad litem and the State that because the mother has been resistant to services, the safety of K.S. could be in jeopardy if returned to her care too soon. The district court did not order the immediate return of K.S. to the mother, rather it ordered,

that the child continue in the custody and guardianship of the Department of Human Services for reunification with the mother. IT IS FURTHER ORDERED that the Department of Human Services shall submit a case permanency plan to the Court, which shall include a reunification plan, and shall make every reasonable effort to reunify the child with the mother prior to the review hearing . . . on May 29, 2012.

As with any child-in-need-of-assistance case, the safety and well-being of the child is the priority—not the needs of the parent. *In re J.E.*, 723 N.W.2d 793, 801 (Iowa 2006) (Cady, J., concurring specially) (stating a child's safety and need for a permanent home are the defining elements in a child's best interests).

In this case, because there were many safety concerns with the mother's home environment and the persons she has chosen to associate with, she must make sustained progress to merit the return of her child. For the time being, it is in K.S.'s best interests to remain in the custody and guardianship of DHS—as the district court provided for—with reunification remaining contingent on the mother's ability to demonstrate a commitment to genuine and long-term change.