IN THE COURT OF APPEALS OF IOWA

No. 2-648 / 12-1060
Filed August 8, 2012

IN THE INTEREST OF A.D.W., A.L.W., and X.M.M.,
Minor Children,

A.W., Father of A.D.W. and A.L.W.,
Appellant,

A.D.W., Mother,
Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Charles D. Fagan, District Associate Judge.

A mother and father appeal the juvenile court's termination of their parental rights. **AFFIRMED.**

Roberta J. Megel, State Public Defender's Office, Council Bluffs, for appellant-father.

Marti D. Nerenstone, Council Bluffs, for appellant-mother.

Thomas J. Miller, Attorney General, Janet L. Hoffman, Assistant Attorney General, Matthew Wilber, County Attorney, and Dawn Landon, Assistant County Attorney, for appellee.

Scott Strait, Council Bluffs, for appellee-father of X.M.M.

Benjamin Pick, Council Bluffs, attorney and guardian ad litem for minor children.

Considered by Eisenhauer, C.J., and Doyle and Tabor, JJ.

TABOR, J.

A mother appeals the termination of her parental rights to three children: eight-year-old X.M.M., four-year-old A.L.W, and three-year-old A.D.W. The father of the two younger children also appeals the termination of his parental rights.[1] Both parents argue the State did not prove grounds for termination under Iowa Code section 232.116(1) (2011). The mother raises four additional claims: (1) she was entitled to a continuance because she did not receive proper notice of the termination hearing; (2) the juvenile court improperly considered an exhibit containing photographs from her Facebook page; (3) the juvenile court erred in denying her motion to appoint an attorney for X.M.M. in addition to his guardian ad litem; and (4) termination was not in the children's best interests.

Because the parents did not maintain "significant and meaningful contact" with their children, we conclude termination was proper under section 232.116(1)(e). In addition, we find no merit to the mother's remaining assignments of error. Accordingly, we affirm.

I. Factual Background and Proceedings

Melissa and Adam were married with two children, A.L.W. and A.D.W. X.M.M., Melissa's older son from a previous relationship, also lived with them in Council Bluffs. In July 2010, the family began receiving voluntary services from the Department of Human Services (DHS) following reports that their two sons, X.M.M. and A.L.W., had suspicious bruises; Adam was violent toward Melissa;

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[1] The juvenile court also terminated the parental rights of X.M.M.'s father, Jeremy. Jeremy does not appeal.

the parents had substance abuse problems; and the parents were locking their children in a bedroom.

In October 2010, the DHS removed the children from their parents' home after a child protection assessment revealed a "chaotic" household with broken glass on the floor; a social worker also saw a bruise on Melissa's face that looked like a handprint. By January 2011, the DHS returned the children home amidst encouraging cooperation from the parents. But the relationship between Melissa and Adam soon deteriorated. On April 25, 2011, while a service provider was at the home, Adam and Melissa fought in the bedroom. They yelled and cursed at one another, while the provider watched the children in the next room. The worker overheard Melissa tell Adam to "get off." Adam threatened to kill everyone in the home and said he had twenty-four bullets for his gun. The provider called the police, and officers had to kick in the door to gain entry into the home. In May, Adam tested positive for cocaine. The parents were "in and out of jail" during early 2011, their home was unsanitary, and they failed to comply with drug screening. The DHS removed the children again in July 2011.

Melissa was hospitalized with a MRSA (methicillin-resistant staphylococcus aureus) infection in August 2011. After her release, she was required to take antibiotics through a PICC (peripherally inserted central catheter) line. Melissa attributed her inability to meet the case plan recommendations to her illness. The social worker found Melissa to be "very evasive" about her medical appointments and "reserved" about the information that she shared with the DHS concerning her treatment.

Melissa attended visits with the children fairly consistently between July and December 2011, but after December she missed ten of the thirty-four scheduled sessions. During the interactions Melissa did attend, she had difficulty controlling the three children or responding to their demands; the social worker recalled that the visits were "not a fun experience." Melissa admitted in her testimony that the visits were "chaotic." Melissa did not participate in parent-child interactive therapy (PCIT) that was offered by the DHS and did not pursue recommended mental health counseling. Melissa completed only two of twenty scheduled drug screens and participated in no testing since November 2011. Melissa's employment has been inconsistent and she was evicted from her home in March 2012. After her eviction, she stayed with friends in Omaha and did not provide the DHS with an address.

In September 2011, the district court revoked Adam's probation on a drug conviction. At the time of the termination hearing he was serving his indeterminate ten-year sentence at the Newton Correctional Facility. His tentative discharge date is not until August 2015.

All three children have been with the same foster family since July 29, 2011. The foster mother described their initial behaviors as "very, very chaotic." A.D.W. was "sickly" and lacked communication skills. A.L.W. was withdrawn and would scream if anyone tried to touch him; he has since been diagnosed with mild autism. X.M.M. was "extremely angry, hurt, upset, and cried." The children were mean to one another. After living in the structured environment provided by the foster family and receiving multiple services, the children are getting along

better. They have integrated into the foster family's routine and are showing more affection. The foster mother testified the children are upset after visits with their biological parents and regress in their behaviors.

On February 27, 2012, the Pottawattamie County Attorney filed a petition to terminate parental rights against both Melissa and Adam, as well as X.M.M.'s father Jeremy. The juvenile court considered the matter during evidentiary hearings on April 24 and May 3, 2012. The court issued its order on May 25, 2012, terminating the rights of all three parents. Melissa and Adam filed separate appeals.

II. Standard of Review

The proper standard of review "for all termination decisions" should be de novo. *In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010) (overruling prior cases applying an abuse-of-discretion standard of review to the question whether termination is in the best interests of the children).

P.L. does not make explicit whether the de novo standard extends to juvenile court rulings on issues such as motions to continue, motions to appoint separate counsel, or the admissibility of evidence. Previously Iowa's appellate courts reviewed such subsidiary rulings for an abuse of discretion. *See, e.g., In re T.C.*, 492 N.W.2d 425, 429 (Iowa 1992) (finding admission of evidence in a termination case was "within the discretionary province of the juvenile court" as directed by Iowa Code section 232.96(6)); *In re A.T.*, 744 N.W.2d 657, 662 (Iowa Ct. App. 2007) (asking whether juvenile court "abused its discretion" in finding one attorney could represent child's legal interests and best interests); *In re*

C.W., 554 N.W.2d 279, 281 (Iowa Ct. App. 1996) (declining to reverse denial of motion to continue unless "injustice will result to the party desiring the continuance"). It is our belief that juvenile courts continue to enjoy discretion to enter rulings that impact the management of the termination trial and should only be reversed if their exercise of that discretion is unreasonable. *See generally* Timothy Storm*, The Standard of Review Does Matter: Evidence of Judicial Self-Restraint in the Illinois Appellate Court*, 34 S. Ill. U. L.J. 73, 89 (2009) (explaining the abuse-of-discretion standard of review "is traditionally reserved for decisions made by a trial judge in overseeing his or her courtroom or in maintaining the progress of a trial").

III. Failure to Maintain Significant and Meaningful Contact

The juvenile court terminated the parental rights of both Melissa and Adam based on Iowa Code section 232.116(1)(e), among other grounds.[2] This provision allows termination if a 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.

Iowa Code § 232.116(e).

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[2] We need not address the parents' challenges to the other statutory grounds cited by the court. *See In re S.R.*, 600 N.W.2d 63, 64 (Iowa Ct.App.1999) ("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 cited by the juvenile court to affirm.").

The legislature defined "significant and meaningful contact" as including, but 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 communication with the child, and requires that the parents establish and maintain a place of importance in the child's life.

Id.

Adam claims on appeal that the State's evidence did not satisfy the third element of section 232.116(e). He contends he has "maintained 'meaningful and significant contact' with his children *as much as his incarceration would allow*." He points out that the DHS was aware he could not comply with the case plan based on his imprisonment. We find clear and convincing evidence in the record that Adam has not affirmatively assumed the duties of parenting. Even before his incarceration, Adam exhibited threatening behavior and refused to submit to random drug screens. While on probation in May 2011, he tested positive for cocaine use. His own poor judgment and criminal conduct have resulted in his inability to sustain meaningful contact with his children. Permanency for his children should not be deferred until he discharges his prison sentence and reestablishes himself as a law-abiding citizen after release from incarceration. We affirm the termination of his parental rights on this ground. *See In re E.K.*, 568 N.W.2d 829, 830–31 (Iowa Ct. App. 1997) (affirming termination based on the lack of "significant and meaningful contact" while father was in prison).

In her petition on appeal, Melissa argues that she has had "as much contact as was allowed with the children." She claims DHS caseworkers "often willfully suppressed and obstructed her ability and right to have contact with her children." We do not share Melissa's view of the case.

Melissa has not made a genuine effort to complete the responsibilities prescribed in the case permanency plan. She did not meet with a domestic violence counselor as recommended. She did not pursue mental health counseling until the time of the termination hearing. She consistently failed to cooperate with random drug screening. She was inconsistent in attending visitations, especially after December 2011. When she did attend supervised visits, she was unable to "demonstrate the ability to monitor all three of her children at developmentally appropriate levels." It was Melissa's inability to maintain control of the children during their interactions that prompted the family safety, risk, and permanency services (FSRP) worker to choose a more restricted setting and time for the supervised visits. While Melissa has been employed on and off throughout the pendency of this case, she was evicted from her residence after the filing of the termination petition, and failed to keep the DHS workers apprised of her current living arrangements.

We agree with the juvenile court that termination of Melissa's parental rights was proper under section 232.116(1)(e). Contrary to Melissa's accusations against the case workers, Melissa's own failings have led to the lack of significant and meaningful contact with her children. *See In re S.J.K.*, 560

N.W.2d 39, 41 (Iowa Ct. App. 1996) (upholding termination where parent failed to establish appropriate home for child).

IV. Mother's Remaining Issues

A. Continuance Based on Improper Service

Melissa argues on appeal the juvenile court erred in denying her motion to continue the termination proceedings, which was based on her allegation that she did not receive proper notice under Iowa Code section 232.112.

At the termination hearing on April 24, 2012, Melissa's attorney offered an exhibit showing the notice published in the Council Bluffs newspaper stated that the hearing involved a child-in-need-of-assistance matter rather than a termination-of-parental-rights case. The county attorney said the sheriff personally served a hearing notice and copy of the petition for termination of parental rights on Melissa at the restaurant where she worked on March 19, 2012. In her testimony during the May 3, 2012 continuation of the termination proceeding, Melissa declined to discuss what her attorney told her about the upcoming hearing in response to the March 19 notice. But Melissa did acknowledge that the case workers told her it was "for a termination hearing."

We hold Melissa had sufficient notice of the termination proceedings and the juvenile court appropriately denied her request for a continuance. *See In re R.E.*, 462 N.W.2d 723, 727 (Iowa Ct. App. 1990) (finding sufficient notice where mother was apprised of fact some dispositional hearing and order would be rendered by the court and mother's attorney had notice of hearing and pretrial contact with client).

B. Consideration of Facebook Photographs

Melissa argues the juvenile court erred in admitting into evidence the DHS case worker's report that contained "inaccuracies, as well as flagrantly unreliable hearsay." She specifically complains about photographs printed from Melissa's Facebook page included in the report. The photographs show a marijuana growing operation. Melissa's counsel objected to the photographic evidence at trial as "blatantly hearsay" and "absolutely not reliable."

The DHS case worker testified at the termination proceeding that she received a tip that she should check Melissa's Facebook page. When the worker did so, she "clicked on a picture of [A.D.W.] and up comes pictures of what I believe is a marijuana growing operation." The worker testified she included the photographs with her report *not* because she believed that the growing operation belonged to Melissa, but explained: "I just have concerns about this kind of criminal activity being posted right next to pictures of her children while she is on visits at the Boys Town office."

Melissa's counsel continued to object, asserting the photographs were "inflammatory" and "wildly hearsay." She told the juvenile court: "these photographs could have been put up by all sorts of people or not."

The court overruled Melissa's objection to admission of the photographs, reasoning:

> For the limited purpose of them being on the Facebook page, I will allow them in, but for no other reason than that, that they were on the page, not that they were Melissa's, put on by Melissa or anyone else. That's the very nature of Facebook. That would be the only purpose for the Court to look at it. I will look at it

> for that purpose, that it is there and not who it was there by, but the nature of it.

Melissa now contends the court did not live up to its limiting language, pointing to a paragraph in the termination order revealing the influence of the improper evidence. The court wrote:

> On 3/28/12 DHS was able to gain access to Melissa' FaceBook and searched through Melissa's photos . . . Melissa's page is not private. Upon clicking on a photo bucket with pictures of the children there are also several photos that include what appears to be a marijuana growing operation. Melissa in court admitted to this being her Facebook page. This speaks to her inability to maintain a safe home. Melissa's judgment is clearly not what it used to be and she is obviously not using good judgment in regard to what she has offered to the world on her FaceBook page.

On appeal, Melissa contends: "Given the ability of strangers, including as is evident from the record, the DHS caseworkers and the assistant county attorney, to access a Facebook account, such photographs are completely unreliable, and the only purpose in their inclusion was to inflame and prejudice the court."

In considering Melissa's evidentiary objections on appeal, we start with the special statute addressing evidence in juvenile cases. Section 232.96(6) appears in the division of the juvenile code dealing with child in need of assistance proceedings. It states, in pertinent part:

> A report . . . or other writing . . . made by the department of human services . . . in a proceeding under this division is admissible notwithstanding any objection to hearsay statements contained in it provided it is relevant and material and provided its probative value substantially outweighs the danger of unfair prejudice to the child's parent . . . . The circumstances of the making of the report . . . or other writing . . . including the maker's lack of personal knowledge, may be proved to affect its weight.

Iowa Code § 232.96(6).

We have interpreted Iowa Code section 232.96(6) as applying in termination hearings. *In re N.N.*, 692 N.W.2d 51, 54 (Iowa Ct. App. 2004).

In this case, the DHS worker offered no personal knowledge about whose marijuana growing operation was depicted in the photographs, who took the photographs, who posted them on Facebook, or whether Melissa was even aware that the photographs appeared on her Facebook page. Normally that lack of personal knowledge would go to the weight to be given the exhibit and not its admissibility.

Even in termination cases though, the proponent of an exhibit bears a duty to offer proof of its reliability if the evidence is challenged. *See In re A.B.*, ___ N.W.2d ___, ___ (Iowa 2012) (discussing Iowa Rule of Evidence 5.901 on authentication requirements). The problem here is that the State did not properly authenticate the photographic evidence. To be admissible into evidence a photograph "must be verified by some competent person." *Hartzell v. United States*, 72 F.2d 569, 580 (8th Cir. 1934). The State did not offer any evidence in this case to identify the photographs in time or place. *See State v. Holderness*, 293 N.W.2d 226, 230 (Iowa 1980) (requiring identification of the picture in time and place before proponent can prove it is relevant to the controversy).

During cross-examination by the county attorney, Melissa identified her Facebook page and acknowledged posting certain photographs of herself on January 31 and February 1, 2012. The county attorney did not ask her about the photographs depicting the marijuana plants.

Information found on social networking websites may be authenticated in the same manner as more traditional kinds of evidence. *See Tienda v. State*, 358 S.W.3d 633, 638–39 (Tex. Crim. App. 2012) (listing direct testimony from witness with personal knowledge as one means to authenticate information stored on electronic media). But without knowing more about the provenance of the marijuana photographs, the juvenile court was mistaken in finding them relevant or material to its ultimate ruling on the termination petition.

Neither are we convinced that the probative value of the photographs of the marijuana growing operation found on Melissa's Facebook page substantially outweighs the danger of unfair prejudice. *See generally State v. Liggins*, 524 N.W.2d 181, 188–89 (Iowa 1994) (finding drug evidence prejudicial because it appealed to jury's instinct to punish dealers). We disagree with the juvenile court's decision to admit the photographs into evidence and the court's conclusion that having them on Melissa's Facebook page "speaks to her inability to maintain a safe home."

Nevertheless, this photographic evidence was a small consideration in the State's overwhelming case for terminating Melissa's parental rights. Without this evidence, "the juvenile court had more than enough proof of the elements necessary to support its decision to terminate [Melissa's] parental rights. *See T.C.*, 492 N.W.2d at 429–30. In our de novo review of the record, we have disregarded these photographs and still find clear and convincing proof that Melissa has not maintained meaningful and significant contact with her children as defined in section 232.116(1)(e).

C. Denial of Request that X.M.M. Be Appointed an Attorney Separate from His Guardian ad Litem

Upon filing of a termination petition, the court shall appoint counsel for the children identified in the petition as parties to the proceedings. Iowa Code § 232.113(2). The same person may serve as the children's attorney and guardian ad litem in a termination of parental rights proceeding. *Id.*

During the termination hearing, Melissa requested that the juvenile court appoint an attorney for her eight-year-old son X.M.M.—in addition to his guardian ad litem—because he expressed concern to his therapist about "leaving his parents and that he won't see them again."

In response, the court quoted from a letter X.M.M. wrote to the judge, saying: "Im worried that if I go back with Melissa and adam the same [bad] stuff will happen….. When I wen to [my foster parents] I felf free and now im super super super happy to live with them." The court concluded: "Given that statement, I don't think there's any ambiguity." The court denied Melissa's request for a separate attorney for X.M.M. Ben Pick, the guardian ad litem, agreed a separate attorney was not necessary.

On appeal, Melissa argues that based on the ambiguity of the documents attributed to her eight-year-old son X.M.M., the court should have granted her request to have a separate attorney appointed to represent X.M.M.'s preference in the termination matter. She relies on *A.T.*, 744 N.W.2d at 665 for the proposition that a separate attorney is required when the guardian ad litem recommends a disposition that conflicts with the child's wishes.

X.M.M.'s situation differs from *A.T.* in two ways. First, the child in *A.T.* was twelve years old at the time of trial and demonstrated "a maturity beyond her years." *A.T.*, 744 N.W.2d at 660. By contrast, X.M.M. was only eight years old at the time of the termination hearing. Second, the child in A.T. "was always vocal in her wishes not to have her mother's parental rights terminated" and "earnestly desired a reunification." *Id.* at 663–64. X.M.M. did not express the same unequivocal desire to reunite with Melissa. In communicating with his therapist, X.M.M. said he felt "bad" he had not seen his mom in a while, but he was also "sad" that Melissa knew Adam was hurting him, but she did not "do a thing about it." In a letter addressed to the judge, X.M.M. wrote that he was worried that if he were reunited with Melissa and Adam he would be hurt again. He added the following preference for staying in his foster home: "I want a house that im safe in[.] I really really do [—] a house like [my foster parents'] . . . ."

Under section 232.116(2)(b)(2), in considering a child's integration into a foster family, a juvenile court may look to the "reasonable preference of the child, if the court determines that the child has sufficient capacity to express a reasonable preference." Under section 232.116(3)(b), the juvenile court may decide not to go forward with severing the parent-child relationship if the child is over ten years of age and objects to the termination. No such statutory presumption exists for a child under the age of ten to object to termination.

To the extent that the court considered X.M.M. to be sufficiently mature to express a preference concerning his foster family, the record shows his preference was to stay in the safety of his foster home. X.M.M.'s situation did not

require appointment of a separate attorney. Ben Pick was capable of serving the dual role of guardian ad litem and attorney for X.M.M.

D. Reasonable Efforts/Best Interests

Melissa melds her argument that the DHS did not make reasonable efforts to reunite her with her children into her claim that it is not in the children's best interest to terminate her parental rights. We reject both assertions.

We do not view the reasonable-efforts requirement as "a strict substantive requirement of termination." *In re C.B.*, 611 N.W.2d 489, 493 (Iowa 2000). "Instead, the scope of the efforts by the DHS to reunify parent and child after removal impacts the burden of proving those elements of termination which require reunification efforts." *Id*. The record shows the DHS made reasonable efforts to reunite Melissa and her children. The DHS provided Melissa with FSRP services, including supervised visitation, transportation, skill building, and referrals to counselors and other community resources. The record shows that she was unable to comply with the case permanency plan even after receiving those services and referrals.

The best-interest framework is set out in section 232.116(2). *In re D.S.*, 806 N.W.2d 458, 465 (Iowa Ct. App. 2011). The primary considerations adopted by the legislature in section 232.116(2) are the safety of the children and the placement that best furthers their long-term nurturing and growth, as well as their physical, mental, and emotional condition and needs. *P.L.*, 778 N.W.2d at 37. Even if termination is in the children's best interests under subsection (2), the juvenile court need not terminate if doing so would be detrimental to the children

due to the closeness of the parent-child relationship. *See* Iowa Code § 232.116(3)(c).

Melissa claims that termination is not in the children's best interests because they are bonded with her. But the record does not show that the closeness of their relationship weighs heavily against termination. The FSRP worker testified that because Melissa holds the youngest child the most during visits, she sees a bond between mother and daughter. But the worker viewed Melissa's connection to her sons as waning. "There was more of a bond at first, but it appears as if there is not as much disappointment if there is not a visit recently." The foster mother discussed the growing bond that she and her husband have formed with the children, recounting how all three children call her "mom" or "mommy" and call their birth mother "Mommy Melissa" or just "Melissa."

The best-interest determination also includes our consideration of how long the children have lived in a stable environment and whether the foster parents are willing to permanently integrate the children into their family. *Id.* § 232.116(2)(b)(1). This factor skews toward termination. The children have benefited from the structure and warmth of foster family care for the past year. Wrenching them from their secure environment would be a major setback in their physical, mental, and emotional development. We find termination is in the children's best interests.

AFFIRMED.